



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Author and Title
Harvard Law Review

Call Number	K 8 A685	Vol.	Copy
1889-90		3	3

THIS BOOK DOES NOT CIRCULATE
OUTSIDE THE BUILDING

Name	Location
XXXXXXXXXX	MAY 15 1983
XXXXXXXXXX	JUN 1 1983

Harvard Law Review

1889-90	Vol.	Copy
	3	3
K		
8		
A685		

HARVARD

994

LAW REVIEW

VOL. III

1889-90

CAMBRIDGE, MASS.

PUBLISHED BY THE HARVARD LAW REVIEW PUBLISHING ASSOCIATION

1890

Copyright, 1890

BY THE HARVARD LAW REVIEW PUBLISHING ASSOCIATION

INDEX.

ARTICLES.	PAGE
CLAYTON-BULWER TREATY, LEGAL RIGHTS UNDER. <i>Freeman Snow</i> . . .	53
DAVIES <i>v.</i> MANN, THEORY OF CONTRIBUTORY NEGLIGENCE. <i>William Schofield</i>	263
DISSEISIN OF CHATTELS. <i>J. B. Ames</i>	23, 313, 337
EQUITY JURISDICTION, BRIEF SURVEY OF. <i>C. C. Langdell</i>	237
INJURIES CAUSING DEATH, IS THE STATUTORY ACTION FOR, TRANSITORY. <i>Jesse W. Lilienthal</i>	116
JUDICIAL NOTICE AND THE LAW OF EVIDENCE. <i>James B. Thayer</i> . . .	285
PATENT LAW, INFRINGEMENT CASES IN. <i>Simon G. Croswell</i>	206
POLICE POWER AND THE RIGHT TO COMPENSATION. <i>Everett V. Abbot</i> . .	189
PONDS, LAW OF. <i>S. D. Warren and L. D. Brandeis</i>	1
PRESUMPTIONS AND THE LAW OF EVIDENCE. <i>James B. Thayer</i>	141
REGISTER OF ORIGINAL WRITS, HISTORY OF. <i>F. W. Maitland</i>	97, 167, 212
STARE DECISIS, DOCTRINE OF, AS APPLIED TO CONSTITUTIONAL QUESTIONS. <i>D. H. Chamberlain</i>	125
STATUTORY REVISION. <i>H. W. Chaplin</i>	73
TIDE WATERS, STATE JURISDICTION IN. <i>Charles F. Chamberlayne</i> . . .	346
 CASES.	
ADMIRALTY. Jurisdiction of collision with raft	333
ADVERSE POSSESSION. See <i>Real Property; Statute of Limitations</i> .	
AGENCY. Exclusive agency to sell	281
Measure of damages for wrongful sale	50
Oral ratification of execution of deed	334
Ratification after revocation of offer	91
ALABAMA CLAIMS. Right to recover war premiums	91
ANTECEDENT DEBT. See <i>Purchase for Value</i> .	
ASSAULT. See <i>Criminal Law</i> .	
ASSIGNMENTS. See <i>Conflict of Laws; Insurance</i> .	
ATTACHMENT. Liability of obligor on delivery bond	379
BANKS AND BANKING. Duty in making collections	48
See, also, <i>Quasi-Contract; Negligence</i> .	
BEQUESTS. See <i>Trusts; Wills</i> .	
BIGAMY. See <i>Criminal Law</i> .	
BILLS AND NOTES. Domiciled Notes	48
Formal requisites	230
Purchaser for value; notice	91
Relation of accommodation indorser to accommodation acceptor . . .	230

CASES. — *Continued.*BURDEN OF PROOF. See *Wills*.CHARITABLE USES. See *Trusts*.CHATTEL MORTGAGE. See *Personal Property*.

COMMON CARRIERS. Burden of proof of negligence 230
 Contract restricting liability for negligence 136
 Purchase of ticket before boarding train 230
 Reasonableness of regulations 48
 Reasonableness a question of law 136
 See, also, *Conflict of Laws*; *Negligence*.

COMMISSIONS. See *Usury*.CONFISCATION. See *Real Property*.

CONFLICT OF LAWS. Assignment for benefit of creditors 281
 Contracts with common carriers 334
 Limitation of actions given by statute 379
 See, also, *Contracts*.

CONSPIRACY. Rights of competitors in trade 281

CONSTITUTIONAL LAW. Authority of judiciary over executive 91

Due process of law; confinement of insane 184

Injunctions against liquor nuisances 230

Sale of property without notice 91

Enforcing liability accruing under foreign statute 49

Ex post facto laws; physician's license 49

Interstate commerce; beef inspection laws 231

Foreign cattle 49

Natural gas an article of commerce 379

State regulation of liquor brought from another State 379

Tax on telegraph poles 136

Judicial and executive powers 231

Police power; Chinese Exclusion Act 136

Nuisances 49

Regulation of grain elevators 282

Regulation of mode of paying employes 334

Right of local self-government 136

Taking property without compensation 185

CONSTRUCTION. See *Wills*.

CONTRACTS. Conflict of Laws 282

Illegality; agreement to violate a duty 185

Agreement to influence legislation 379

Combination to raise price of wheat 282

Tax collector's commissions 231

Wagering contracts 185

Measure of damages on unconscionable contract 334

Parties not bound by mistakes of telegraph 186

Remedies in case of breach after part performance 380

Breach by plaintiff 379

Right of beneficiary to sue 185

Subscription papers 92

See, also, *Conflict of Laws*; *Equity*; *Husband and**Wife*.CONTRIBUTION. See *General Average*; *Real Property*.

CASES.—*Continued.*

CONVERSION. Successive equitable assignees of proceeds of chose in action	380
CORPORATIONS. Negligence of officers	380
Power of directors to appropriate funds	92
Right to recover land which it cannot hold	380
Taxation of foreign corporation	380
"Trusts;" illegality of	334
See, also, <i>Real Property</i> .	
COVENANTS. See <i>Real Property</i> .	
CRIMINAL LAW. Assault with dangerous weapon	48
Bigamy; belief in death of former husband	137
Escape pending appeal	186
Libel; former acquittal	137
Jurisdiction of court	282
Murder; malice presumed from killing	137
DECEIT. False statements made in good faith	231
DECLARATIONS AGAINST INTEREST. See <i>Evidence</i> .	
DELIVERY. See <i>Sales</i> .	
DISCOVERY. See <i>Equity</i> .	
DONATIO MORTIS CAUSA. Delivery	92
DOWER. Effect of wife's release of, in a mortgage	232
Merger of	94
See, also, <i>Trusts</i> .	
DURESS. Threats against child	92
EASEMENT. See <i>Real Property</i> .	
EQUITY. Bill of revivor in patent cases	50
Covenants of infants	380
Discovery in aid of proceedings in foreign court	92
Injunction of nuisance	282
Injunction of reasonable use	335
Injunction to restrain publication of photographs	92
Obligation imposed by law	232
Reformation of fraudulent mis-description in deed	282
Specific performance	380
Part performance of oral contract	284
Suit to compel husband to support his wife	186
See, also, <i>Constitutional Law</i> ; <i>Husband and Wife</i> ; <i>Patents</i> ; <i>Real Property</i> .	
ESTOPPEL. By conduct	232
In cancellation of insurance policy	232
EVIDENCE. Best evidence rule	93
Competency of witnesses	93
Declarations against interest	137
Duty to produce books before master	335
Foreign laws; made of proof	137
Judicial notice; nature of tobacco	137
Parol evidence rules; direct evidence of testator's intention	139
Privileged communications	138
<i>Res gesta</i>	186

	PAGE
CASES.—EVIDENCE.— <i>Continued.</i>	
Right to cross-examine adverse witness	283
View by jury	93
See, also, <i>Slavery; Wills.</i>	
FACTORS AND BROKERS. See <i>Agency.</i>	
FEDERAL COURTS. Property in custody of court	381
FIXTURES. See <i>Real Property.</i>	
FOREIGN LAW. See <i>Evidence.</i>	
FRAUD. False statements made to mercantile agency	138
See, also, <i>Real Property.</i>	
GENERAL AVERAGE. Right to contribution for jettisoned cargo	335
HIGHWAYS. Obstruction by order of court	50
Stream used for driving logs	232
HUSBAND AND WIFE. Contract between, enforced in equity though void	
at law	381
Effect of articles of separation providing for support	381
Right to sue for enticement of husband	381
Wife's contract to support husband void	136
See, also, <i>Contracts; Equity.</i>	
ILLEGALITY. See <i>Contracts.</i>	
INFANCY. Judgment against infant by default voidable	381
Voidable power of sale	138
INJUNCTION. See <i>Equity.</i>	
INSANITY. See <i>Constitutional Law; Real Property.</i>	
INSURANCE. Assignment of policy	138
Cancellation of policy	232
Conditions	335
Subrogation	50
Violation of conditions	283
Wagering policy	381
INTERSTATE COMMERCE. See <i>Constitutional Law.</i>	
JUDICIAL NOTICE. See <i>Evidence.</i>	
JURY. Competency; juror with opinion as to guilt of accused	138
LANDLORD AND TENANT. Dangerous promises	232
LIBEL. Privilege in report of judicial proceedings	93
See, also, <i>Criminal Law; Slander of Title.</i>	
LIS PENDENS. See <i>Real Property.</i>	
MALICIOUS PROSECUTION. Civil action	233
MANDAMUS. Compelling railroad to furnish stations	335
MEASURE OF DAMAGES. In statutory action for death of human being	284
See, also, <i>Contracts; Real Property.</i>	
MERCANTILE AGENCY. See <i>Fraud.</i>	
MORTGAGE. See <i>Real Property.</i>	
MURDER. See <i>Criminal Law; Wills.</i>	
NEGLECT. Dangerous substances	50
Disobedience of city ordinance not contributory	381
Liability of bank directors for	48
Liability of common carrier for	136
Parent's negligence not imputed to child	233
Not imputed to passengers	93
Voluntary bailee	187
See, also, <i>Common Carriers; Corporations.</i>	

CASES. — *Continued.*

NOTES. See <i>Bills and Notes.</i>	
NOTICE. See <i>Corporations; Purchase for Value.</i>	
NUISANCE. Reasonable use of land	187
See, also, <i>Constitutional Law; Equity.</i>	
PAROL EVIDENCE. See <i>Evidence.</i>	
PARTIES. See <i>Contracts.</i>	
PARTNERSHIP. Creation of	335
Liability of deceased partner's estate	233
Sale of realty by surviving partner	283
PARTY-WALLS. See <i>Real Property.</i>	
PATENTS. Injunction before issue of patent	50
Patent used only for gambling purposes not entitled to equitable protection	283
See, also, <i>Equity.</i>	
PERSONAL PROPERTY. Chattel mortgages; definiteness of description . .	184
Joint ownership of grain in warehouse	93
Seats in stock exchange	93
See, also, <i>Sales.</i>	
PLEADING. Misstatement of legal effect of facts	138
POLICE POWER. See <i>Constitutional Law.</i>	
POWERS. See <i>Real Property.</i>	
PRIVILEGED COMMUNICATIONS. See <i>Evidence.</i>	
PUBLIC POLICY. See <i>Contracts.</i>	
PURCHASE FOR VALUE. Notice	91
Satisfaction of antecedent debt	138
QUASI-CONTRACT. Failure of consideration in purchase of land	382
Obligation imposed by statute	382
Payment of forged check by mistake	382
See, also, <i>Real Property.</i>	
REAL PROPERTY. Conveyance in fraud of creditors	283
Covenant against incumbrances; existing easements	93, 233
Measure of damages	283
Covenant running with the land	233
Deed of lunatic	382
Easements; continuous and apparent	233
Equitable relief for obstruction	138
Fixtures	187
Mortgagee's rights in	51
<i>Lis pendens</i> ; effect of subsequent appeal	138
Mortgage; power of sale	186
Party-walls; rights of owners	187
Powers; rights of donee's creditors	187
Private property affected with public interest	50
Restraint on alienation	94
Reverter on dissolution of charitable corporations	136
Rule against perpetuities; estate to unborn child of unborn child . .	283
Not applicable to crown grants in colonies	139
Power of appointment by will	139

	PAGE
CASES. — REAL PROPERTY. — <i>Continued.</i>	
Tenants in common; right to contribution	139
See, also, <i>Dower; Landlord and Tenant; Statute of Limitations.</i>	
RES GESTA. See <i>Evidence.</i>	
RESTRAINTS ON ALIENATION. See <i>Real Property.</i>	
RULE AGAINST PERPETUITIES. See <i>Real Property.</i>	
SALES. Conditional upon payment	233
Continued possession of vendor	336
Delivery; tender of homogeneous articles in bulk	284
Right of inspection after payment	284
SLANDER OF TITLE. Privileged communications	382
SLAVERY. Presumption of freedom from purchase of slave by her mother	186
SPECIFIC PERFORMANCE. See <i>Equity.</i>	
STATUTE OF FRAUDS. Promise to indemnify a surety	234
See, also, <i>Equity.</i>	
STATUTE OF LIMITATIONS. Adverse possession by mistake	94
Constructive adverse possession	382
Nuisance	336
Payment of interest on a bond	382
Tacking interests	234
See, also, <i>Conflict of Laws; Quasi Contract.</i>	
STATUTORY ACTIONS. See <i>Conflict of Laws; Measure of Damages.</i>	
STOCK EXCHANGE. See <i>Personal Property.</i>	
SUBROGATION. See <i>Insurance.</i>	
SURETYSHIP. Release of principal	234
TAXATION. See <i>Corporations.</i>	
TELEGRAPH COMPANIES. Liability for delay of telegram	51
Liability to receiver for negligence	139
See, also, <i>Constitutional Law; Contracts.</i>	
TENANTS IN COMMON. See <i>Conversion; Real Property.</i>	
TESTAMENTARY CAPACITY. See <i>Wills.</i>	
TREASON. See <i>Real Property.</i>	
TRUSTS. Bequests to charitable uses	383
Charitable trusts	187
Constructive trusts	94
Investment of trust funds	336
Right to follow proceeds of trust property	234
Widow of trustee dowerless	336
"TRUSTS." See <i>Corporations.</i>	
USURY. Deduction of commissions from loan	234
WAGERS. See <i>Contracts; Insurance.</i>	
WATER AND WATERCOURSES. Change of natural flow	94
Covenants by riparian owners as to use of stream	234
See, also, <i>Equity; Highways.</i>	
WILLS. Burden of proof as to testamentary capacity	188
Charging legacies on residuary realty	51
Construction; imperfect description	383
Lapsed bequests	94
Murder of testator by legatee	234

CASES. — WILLS. — <i>Continued.</i>	PAGE
Testamentary capacity	336
<i>See, also, Evidence; Trusts.</i>	
WITNESSES. <i>See Evidence.</i>	
CORRESPONDENCE	89

LECTURE NOTES.

CONTRACTS. Mistake of fact; defence of purchase for value	90
EVIDENCE. Bacon's maxim, 25; latent and patent ambiguities	332
FIXTURES. Priority between chattel and real-estate mortgagees	47
REAL PROPERTY. Prescription, discussion of, in <i>Angus v. Dalton</i>	183
TRUSTS. Choses in action; rights of successive assignees	46

NOTES.

BIGAMY. <i>Regina v. Tolson</i>	180
BISHOP OF LINCOLN. Trial	42
BRAXFIELD, LORD. Scottish sedition trials	43
CANING. Punishment at school; <i>Gardner v. Bygrave</i>	229
CONTRACT. Base-ball players; <i>Ward's case</i>	329
Right of beneficiary to sue the promisor	87
CRIMINOLOGY. Positive school	280
CRONIN TRIAL. Jury finding	378
Witnesses allowed to testify	181
FIXTURES. <i>Hill v. Mundy</i>	182
THE GREEN BAG	87
HARVARD LAW REVIEW. Editorial	41
HARVARD LAW SCHOOL. Dean's Report, 1888-89	375
Registered students, 1888-90	132, 180
HARVARD LAW SCHOOL ASSOCIATION. Membership	226, 278
Prize essay of 1889	226
Prize essay of 1890	132, 278
HEARSAY. Massachusetts statute, c. 100, 1889	181
INSANITY. As defence in homicide	279
JUDGES. Answer to questions put by the legislature; Massachusetts	228
JURY OF MATRONS. <i>Bathsheba Spooner's case</i>	44
LARCENY. A Cambridge (Eng.) moot court case	84
Attempt where the crime never could be completed	375
LAW HOSPITAL	44
LEGAL ETHICS. Address of Judge Jeremiah Smith	377
LEGISLATURES. Distrust of them shown in the United States	278
LIBEL. Relaxation in the law of newspaper libel	86, 331
MAITLAND, PROFESSOR	133
Select pleas of the crown	42
PAPAL SUCCESSION	41
PATENT MEDICINES. <i>Blood Balm Co. v. Cooper</i>	227
"PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW." James C. Carter	279
"PUBLIC RIGHTS IN NAVIGABLE WATERS." P. Edward Dove	227
"PUTTING NEW WINE INTO OLD BOTTLES." Elizabethan lawyers	84
REVERTER. Of realty on dissolution or civil death of corporation	135
SEISIN. In Connecticut and Massachusetts	133

NOTES.— *Continued.*

PAGE

SINGLE TAX. Henry George system; Mr. Samuel B. Clarke	85
SLEEPING CARS. Owners liable as innkeepers for baggage of passengers	376, 377
SUPREME COURT OF THE UNITED STATES, RELIEF OF	376
TORTS. English edition of Bigelow's Law of Torts	86
TRUSTEE. English statute of 1889	182
TRUSTS. Restoration of stolen bonds by the thief	133
WAMBAUGH, MR. EUGENE	132
WITNESSES. Allowed to testify in spite of their evasion of an order of exclusion	181
WOMAN-BURNING	229

REVIEWS.

Abbott's Criminal Brief	235
Anderson's Dictionary of Law	140
Bacon on Benefit Societies	95
Fraser on Libel	336
Gray's Cases on Property. Vol. II.	52
Green on Crime	383
Keener's Cases on Quasi-Contracts	96
Martindale's Conveyancing	188
Mechem on Agency	52
Thompson on Trials	95
Vickers on Police Officers and Coroners	140

HARVARD LAW REVIEW.

VOL. III.

APRIL 15, 1889.

No. 1.

THE LAW OF PONDS.

AN article in the February number of the HARVARD LAW REVIEW, entitled "Great Ponds,"¹ deserves attention, because it is the most studied attempt hitherto made to defend the conclusion, though not the reasoning, of the majority of the court in the Watuppa Pond cases. We say the conclusion and not the reasoning, because the author of the LAW REVIEW article, while not contesting the reasoning of the majority of the court, tacitly discards it, and rests his own argument upon grounds not referred to in the opinion.

As stated in the December number of the LAW REVIEW,² "all the judges apparently admitted that, according to the common law, the Legislature could not authorize the taking of the water of a pond without providing for compensation for damages done the riparian owners on the outlet stream by a diminution of its flow. But the majority³ of the court were of the opinion that these cases were taken out of the general rule, because the North Watuppa is a 'great pond,'⁴ governed by the provisions of the Massachusetts Colony Ordinance and Ancient Charter of 1641—

¹ 2 HARVARD LAW REVIEW, 316.

² 2 HARVARD LAW REVIEW, 196.

³ Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548.

⁴ It has recently been said inadvertently, referring to Mass. St. 1869, c. 384, that "by the present laws great ponds are defined to be ponds the area of which is more than twenty acres," and a similar statement was made by us in 2 HARVARD LAW REVIEW, 197, 198. Our attention has been called by one of the editors of this REVIEW to the fact that Mass. St. 1869, c. 384, did not change the limit of what should be deemed great ponds, but merely granted to the littoral owners on ponds between ten and twenty acres in extent certain rights as to fisheries. See also St. 1888, c. 312.

47,"¹ and that the effect of the ordinance was to give the Legislature absolute power over the waters of the pond. The author of the article on "Great Ponds," on the other hand, does not rest his support of the Watuppa Pond decision upon any rule peculiar to Massachusetts great ponds, but asserts that the right of riparian proprietors to the undiminished flow of a stream of water depends upon the law of watercourses, or of running water; that a watercourse must have a perceptible current; that when the water is still, or has no perceptible current, we have to deal with a different body of law, — the law of lakes and not the law of watercourses, — and he argues that there is no legal rule prohibiting the diversion of still water, *i. e.* water without perceptible current, even though it forms an integral part of a waterway. While, therefore, the whole court in the Watuppa cases admitted that there would be a right of action for diversion from a pond not affected by the Colony Ordinance, the author of the article on "Great Ponds" insists that any right on the part of a riparian proprietor on the outlet stream of a pond, either great or small, to object to the diversion of water from the pond is yet to be established. He does not seriously controvert the position taken by us in the December number concerning the effect of the ordinance, but asserts a new doctrine which is opposed to the rule of law assumed to be correct by all of the judges. We have, therefore, no occasion to reconsider the conclusions previously reached by us, but merely to examine what may fairly be considered the novel point now presented.

The point is thus expressed by him *passim*: —

"The agreed facts find that there was 'no perceptible current whatever' [in the North Watuppa Pond]. Did, therefore, any watercourse, in point of law, continue clear through the lake, several miles long, or did the watercourse in which the plaintiff had a right commence at the point where the water started into motion at the outlet? . . . The water lawyers hoped for a full discussion here upon the topic whether and when a lake is a watercourse. They have seen many books entitled Law of Watercourses, Law of Running Waters; less about the law of still waters or the law of lakes, and almost nothing about the intermediate case, where there is a lake with one brook running out of it and another running into it. . . . The law of running water originated

¹ Recent investigations point to the conclusion that the extension of the provisions in the Body of Liberties relating to Great Ponds was made in 1660, and not in 1647. See "Introduction to the Reprint of the Colonial Laws containing the Body of Liberties" (Boston, 1888), by William H. Whitmore.

in natural right. . . . Such duty and right grow out of motion, continued, definite, perceptible movement of that part of the realty we call water. . . . No such course of thought, no such desired legal adjustment of correlating rights, call for such law in respect of waters that do not move."

If, in reality, the point made relates only to waters which do not move, we are not concerned with it in connection with the Watuppa Pond cases; for the water in the two Watuppa Ponds did move, and supplied the Quequechan with all its water, the average flow being about twenty-six million gallons daily. The North Watuppa Pond alone, from which the diversion took place, was stated in the agreed facts to be capable of yielding fifteen million gallons of water daily. The main source of supply of this pond was from "springs beneath its surface." We must, therefore, suppose that the author intends to distinguish between waters which move with perceptible current and those which move without perceptible current, and not between waters which move and those which do not move. But does he intend to say that the test of perceptible current is to determine always and absolutely the question of what is a watercourse, so that that part of a river in which there is no perceptible current is not a watercourse of which the law of running waters can be predicated, and that that part of a lake in which there is perceptible current is a watercourse of which the law of still waters cannot be predicated? It would appear that this new cross-division of the law must be maintained by the writer, cost what it may; for current that can be perceived is the only possible difference between waters which ordinarily move slowly within the broad bed of a lake or pond, and waters which ordinarily move rapidly within the narrower confines of a river. But even this distinction might be an unfortunate one to draw when attempting to support the Watuppa Pond cases, for it appeared by the agreed facts that "at or near the passage into the South Watuppa Pond there is generally a slight current towards the latter," and that the taking was from the North Pond within a short distance of the passage. It was only in the "body of the pond" that there was no perceptible current.

The right of riparian owners is to the flow of the stream on their land, as it has been accustomed to flow. They have no title to the water above them, nor any right as riparian owners to the watercourse above their own land. The water may be diverted with impunity above, provided it is returned to the old channel

before or when it reaches their land. It is the watercourse present with them, on which their lands abut, from which spring their legal rights. It does not follow that to enable them to complain, the interruptions of such flow must be interruptions of a watercourse at the point where the interruption takes place, though of course ordinarily the diversions which arise are of water already forming part of a watercourse. In order to sustain our author's position, it would be necessary for him to establish not only that a lake with no perceptible current is not a watercourse, but also that diversions from a lake with no perceptible current are not actionable. A careful examination of the article on "Great Ponds" will, we think, show that its author not merely fails in this task, but that in essaying it he begins by misstating the position of the minority of the court in the Watuppa Pond cases, proceeds by misinterpreting authorities, and ends by drawing illogical conclusions.

An investigation of the cases will lead the reader to a choice between the two horns of this dilemma, either: First, *A pond with an outlet stream is part of a watercourse for all purposes within the meaning of the law of watercourses, without reference to the test of perceptible current*, or, second, *So far as concerns the right of riparian owners on the outlet stream of a pond to a flow undiminished by subtraction from the pond itself, it is immaterial whether the pond itself is for all purposes to be treated as a watercourse*; for the inquiry whether or not a lake or pond should be deemed a watercourse is irrelevant, unless it be shown that the diversion from a watercourse only gives rise to an action.

The minority opinion in the Watuppa Pond cases had stated that "The *river and ponds* are parts of a natural waterway, through which the water passes directly from its sources to the sea. Together they constitute a single system and natural feature of the country, the preservation of *whose* form and identity is essential to the enjoyment of all the property bordering upon *their* waters."¹ This statement the Law Reviewer misquotes so as to read, "*the form and identity of the natural features of the country*," thus foisting upon the minority the position that a riparian owner's

¹ 147 Mass. 548, 562. The italics here and elsewhere are ours.

rights are to "configuration of the soil from mountain-top to the sea." The "form and identity" the court referred to was obviously and grammatically that of the waterway composed of river and ponds. The substituted statement of the reviewer would apply to the whole drainage basin of the water system, and prohibit any change in its natural features. On this misstatement of fact hangs the whole argument from analogy, the analogies cited being taken wholly from the law of land, and having no application to waterways composed of rivers and ponds. That upland forests may be felled without regard to the incidental damage done on a stream through consequent floods or freshets; that marshes and swamps may be drained with similar disregard; that surface-water may be diverted without giving rise to a liability; that no prescriptive right can be obtained to the passage of rains and melting snows over the surface of the land; that subterranean percolations are subject to the right of the owner of the soil to use his soil for proper purposes, though they are thus cut off from a watercourse,—are all cases in which the right of the owner to a reasonable use of his land has been sustained, notwithstanding the casual damage to water privileges.¹ If the minority opinion had maintained (as the author says it did) that the maintenance of "the form and identity of the natural features of the country" is the riparian owner's right, then these cases would have a bearing to show in contradiction that land may be dealt with by its owners as they please, so long as water which has reached a defined bed and limits is not interfered with. But as, in fact, the court referred solely to the "form and identity" of the watercourse of ponds and rivers, these cases have no application. They mark the line where the law of waters meets the law of land and is limited by it, and not, as is contended, the division between the law of running and the law of still waters.²

The following are the cases relied upon in the article on "Great Ponds."

¹ It is by no means clear that a marsh owner can always drain his swamp so as to dry up or diminish a watercourse which it directly feeds. The only authority cited is the dictum in *Broadbent v. Ramabotham*, 11 Exch. 602, where the connection between swamp and watercourse was neither direct, certain, nor constant. See *Williamson v. Canal Co.*, 78 N. C. 156; *Bennett v. Murtaugh*, 20 Minn. 151.

² In fact, perceptible current can often be predicated of swamp and surface waters and subterranean percolations which are not watercourses.

(1.) Of *Macomber v. Godfrey*, 108 Mass. 219, the author says : —

“They [the water lawyers] were told by the court that even being a ‘natural waterway’ is not enough to make it a watercourse, unless there is a current.”

Turning to that case, we do not find the words “natural waterway” used at all ; nor do we find the proposition laid down that a natural waterway is not a watercourse unless there is a current. Indeed, there was a current at all points in the body of water in question, and the sole issue was whether the fact that on the land of the plaintiff it broadened out, though maintaining its current, and spread itself across without definite channel, prevented its being a watercourse on his land. The point decided was that the absence of defined banks did not upon all the facts of the case, including the fact of current, prevent the application of the law of watercourses. It should be noticed that the question was not whether it was a watercourse at the point where the diversion took place, but whether it was such on the land of the plaintiff. The court contrasted the case with that of surface-water and water flowing in temporary outbursts caused by melting snow and rain.

(2.) The author next asserts that : —

“To entitle it to the consideration of the law, it is certainly necessary that it should be a watercourse in the proper sense of the term ;”

purporting to quote Lewis, C. J., in *Wheatley v. Baugh*, 25 Pa. St. 528, and also cites to the same effect Bigelow, C. J., in 2 Allen, 589. The language quoted cannot be found in either case. *Wheatley v. Baugh* was a case of underground percolations, in no definite channel, supplying a spring, and cut off by the use of superjacent land for mining and other lawful purposes, and in it the court said : —

“Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly the law has never gone so far as to recognize in one man a right to convert another’s farm to his own use, for the purposes of a filter.

“Such a claim, if sustained, would amount to a total abrogation of the right of property.”

In *Griffith v. Jenkins*, 2 Allen, 589, the plaintiff’s declaration was tort for diverting the water of a brook or ancient watercourse

running through his land. His proof was of the diversion of a brook above his land which did not come to his land, but emptied into a swamp thereon. The court declared that a swamp is not a brook. Bigelow, C. J., says:—

“The gist of the cause of action is for a diversion of the water of a stream or watercourse. This was an essential and material averment, which the plaintiffs were bound to prove in order to maintain their action, and it was a variance to show that the acts of the defendants had drained water from the swamp without any proof to sustain the allegation of a diversion of water from a brook.”

(3.) *State v. Gilmanton*, 9 N. H. 461, 14 N. H. 467, was an indictment for not keeping a highway in repair. The issue depended upon whether a certain bridge was within the limits of a town, and that again on the title to certain land under a body of water which formed one boundary of the town. If this was a river, the law of New Hampshire held the title of the town to extend to the centre thereof; if any large body of water not a river, by whatever name called, the town boundary was at the water's edge. It was held that, on the other special facts of the case, the existence of a perceptible current became controlling evidence in determining whether the body of water in question was a river or not a river. The question of watercourse was not raised, nor were any riparian rights involved. It was expressly affirmed that a lake would not lose the character of a lake, simply because it had a current, and that “a sheet of water in which there is a current from its head towards its outlet is not, therefore, a river.” In other words, it declares that the test of perceptible current is not generally applicable even to distinguish lakes from rivers.

(4.) *Broadbent v. Ramsbotham*, 11 Exch. 602, is next cited to the effect that

“defendant owned a pond of six acres, the overflow of which went into the plaintiff's brook. The court held, plaintiff's right cannot extend further than the flow into the brook itself and to the water flowing in some defined natural channel. Before it reaches such defined channel the land-owner had the right to appropriate it.”¹

¹ It would hardly be believed from this reference that the Massachusetts court in the case of *Macomber v. Godfrey*, *supra*, had cited this same English case as authority for the proposition that

“If the whole of the stream had sunk into the defendant's soil, and no water remained to pass to the plaintiff's land except under the surface, it would have ceased to be a watercourse, and the plaintiffs would have had no right to it.”

This so-called pond is thus described by Alderson, B. (p. 614) :—

"Above Pighill Wood a shallow basin is formed by the landslips, which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill towards Longwood Brook. The rest sinks into the ground or remains as a pond in the hollow thus naturally created by the form of the land. Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow of the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak), over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond, and to get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that, as to this source of feeding the Longwood Brook, the plaintiff has no title."

In other words, this again is a case for the law of land, and not of waters; and this so-called pond of six acres, which the author would have us compare to any great pond in Massachusetts, fed by perennial springs, which forms an integral and important part of some great waterway with its vast power, turns out to be but an intermittent surface-sheet which, really a swamp, has no outlet in any defined channel, but is a nuisance and a fit subject for drainage.

(5.) *Chasemore v. Richards*, 7 H. L. C. 349, is a case of underground percolations diverted by the digging of a well.

(6.) *Rawstron v. Taylor*, 11 Exch. 369, is a case of surface-water; and, as is stated by Platt, B., in the latter case, "the defendant had a right to drain his land, and the plaintiff could not insist upon the defendant maintaining his fields as a mere water-table."

(7.) The Massachusetts cases on great ponds have already

been stated and commented on in the article on the "Watuppa Pond Cases." None of them afford countenance to the "perceptible current" theory, nor anywhere suggest the distinction taken by the writer. All of them are founded on the Colony Ordinance, and all those cited by the author raise issues affecting only the rights of littoral proprietors on the ponds themselves. Any expressions found in such cases must therefore be construed with reference to the points involved. In *Fay v. Salem Aqueduct Co.*, 111 Mass. 27, so much relied upon, we find no mention of the fact whether or not Spring Pond had a perceptible current; but if anything can be found in the case inconsistent with the position that it was a watercourse, then it follows that it is immaterial, so far as concerns riparian owners on the outlet stream, whether a pond is a watercourse or not; for in cases arising under water-supply acts precisely similar in terms to the one in that case, which granted compensation for injury to "property," riparian owners on the outlet stream have been given the remedy there denied Mr. Fay for his alleged injury as a littoral proprietor on the pond. See *Bailey v. Woburn*, 126 Mass. 416; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Cowdrey v. Woburn*, 136 Mass. 409; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394. The majority of the court in the Watuppa Pond cases apparently reconcile their decision with these cases on the theory that the riparian owner on the outlet stream has a property right in the flow of the water from great ponds, but that it is a right of property subject to be defeated by the paramount right of the Commonwealth; but the Law Reviewer's new proposition in the law of waters denies any property right at all to the riparian owner, and hence necessarily denies the authority of these decisions.¹

¹ This theory, while affording a basis of a reconciliation between the earlier cases and the recent Watuppa Pond decision, will, if adopted, render the former inconsistent with *Cole v. Eastham*, 133 Mass. 65, 70, an authority much relied upon in the article on "Great Ponds," though beside the main line of argument. In that case the statute had authorized the town of Eastham to make the improvements necessary for the preservation and taking of alewives in a great pond and the streams connected therewith, enacted that the town should pay "all damages that shall be sustained in any way by any person in their property in carrying into effect this act," and further provided that the fishery so created should be the property of the town. The petitioners owned the land on both sides of a stream, which was not navigable, connecting with the pond; the land was taken by the town, and the petitioners claimed that they should recover damages also for the loss of the exclusive right of fishery. The court held that the right of the riparian owner to a fishery

These are all the cases relied upon to sustain the novel doctrine laid down in the article on "Great Ponds." Not one of them supports it; only one of them mentions "perceptible current," and that one for a purpose entirely different from that for which it was cited by the author.

We shall now examine the cases which in our opinion affirm the right of riparian owners on outlet streams to compensation for water diverted from lakes or ponds, which were either lightly brushed away or entirely overlooked in the article on "Great Ponds."

(1.) *Smith v. Rochester*, 92 N. Y. 463.

The action was by owners and lessees of mills upon Honeoye Creek to restrain the defendant from diverting the waters of Hemlock Lake from said creek. Hemlock Lake is a body of water about

had in this Commonwealth, at all times, been subject to the paramount right of the public, and that when the statute provided compensation for the taking of "property" it must be considered that the property for which the petitioners "are to receive compensation is private property strictly, and not such as is held by them subject to the exercise of a public right." If the right to the fish, subject to defeasance, was not "property" within the meaning of the act in *Cole v. Eastham*, why should the right to the water have been "property" in *Bailey v. Woburn*, unless it be because that right is not subject to defeasance?

In other words, while the paramount right of the public to the fishing, even in streams not navigable, has always been recognized in this Commonwealth, the alleged paramount right of the public to an interest in the water-power of the State had never been recognized, until the *Watuppa* cases, 147 Mass. p. 548. In the former respect the common law had been "modified by successive legislative acts from the earliest settlement of the country, passed under the two governments of the Plymouth and Massachusetts Bay Colonies, as well as under the Province and our present form of government," and that because "there was much jealousy on the subject of exclusive individual privileges in fisheries" in early times. See *Devens, J.*, 133 Mass. p. 67. In the latter respect, not a single act, until that of 1886, called in question in the *Watuppa* cases, had ever been directed against the private ownership of water-power; while, on the other hand, the mill acts had strained the constitutional power of the State to the utmost in support of the fullest enjoyment thereof.

The above distinction is quite in accord with the spirit of the Colony Ordinance of 1641-47, which was simply a democratic protest against the forestry and game laws of the mother country, but in other particulars did not provide or contemplate a change in the common-law rules of property.

It may be that legislation enacted before our Constitution, even though originally an encroachment on private property, if long acquiesced in, because in accord with the spirit of our institutions, should now be upheld by the court as a rule of property *ut finis sit litium*; but it is quite another thing to extend by forced interpretation an ancient ordinance to a new application subversive of a well established and long undisputed rule of property, in order by indirection to avoid the plain prohibition of our present constitution, which forbids the taking of private property for public use without compensation to the owner.

seven miles long and half a mile wide. The outlet of the lake unites with that of Canadice Lake, a stream of nearly the same size. After flowing about five miles, the waters of the two lakes unite with Honeoye Creek, the outlet of Honeoye Lake, and these united waters flow into the Genesee River, about sixteen miles above the city of Rochester. The plaintiffs owned mills upon the Honeoye Creek, below its junction with the waters of Hemlock Lake, and operated by the waters of the creek. A board of water commissioners, acting in behalf of the city of Rochester, conducted the waters of Hemlock Lake through a conduit to the city of Rochester, for the use of its inhabitants. The waters of Hemlock Lake were a part of the navigable waters of the State. Held, that the State could not divert, nor could it authorize the diversion of the waters of this lake, to the detriment of the plaintiffs, without making compensation therefor. The question made was on the right of the State under its authority as sovereign — the *jus publicum* — to divert the waters of navigable streams.

This case, the LAW REVIEW writer says, "does not say a lake is a watercourse. There was no finding whether there was a current or not," — strong evidence, surely, that that issue was immaterial, for the case was apparently most carefully argued and considered.

He adds that it "was exactly the case of 134 Mass. 267," where the court held that the act provided for such damage. But he omits to state that the New York court rested its decision on constitutional grounds and not upon the wording of the act.¹

(2.) *Gardiner v. Newburgh*, 2 Johns. Ch. 162. An injunction was granted against the diversion of a spring on the land of one of

¹ The opinion in this case is very much in point on the rights of the State in great ponds. Much confusion has arisen, says the court, from a failure to distinguish between the two kinds of ownership which can be predicated of the State; the first, the proprietary interest, — *jus privatum*, — which is subject, like an individual's right of property, to the maxim, *Sic utere tuo ut alienum non laedas*; the second, its sovereign rights, — *jus publicum*, — which it holds in trust for its citizens. Considered with reference to rights in water, "the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved. . . . Neither subject nor sovereign can have any greater than a usufructuary right therein." *Aqua currit et debet currere*. By virtue of a proprietary right as riparian owner "the rights of the State have entitled her to the same uses and subject her to the same liabilities as other owners of property." By virtue of her sovereign rights, the State may control navigable and public waters; but this is an easement for the public benefit, and is to be limited to the purposes for which it was created. Hence, "the diversion of these waters for the purposes of furnishing the inhabitants of a large city with that element for domestic uses, . . . is an object totally inconsistent with their use as a public highway or the common right of air

the defendants, which watered the farm of the plaintiff and supplied his brick-yard by means of a natural stream of water flowing therefrom. No provision was made for compensation to the plaintiff, through whose land the water issuing from the spring had been accustomed to flow. "To divert or obstruct a watercourse," says Chancellor Kent, "is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy."

(3.) *Howe v. Norman*, 13 R. I. 488, was a bill in equity for an injunction. The principal respondent admitted that there was a stream of water "which has its rise in certain springs arising on neighboring lands of this respondent, and forming thereon a large pond, which stream of water flows through the lands of the complainant." He alleged that he owned the water arising from such springs on his own land, and had a right to cut off any stream which ran from his land, "by erecting a dam across the place where the water takes the form of a stream upon his said lands." A decree was entered perpetually enjoining the defendants from preventing

the people to their benefits." "We deny that" such use, although a public one, "is consistent with the purpose upon which the sovereign right is based."

So of great ponds, the right of the State as proprietor of their beds (if it exists) is no greater than that of the private owner of a small pond; and the sovereign right to control its uses as a pond for the benefit of the public at large is inconsistent with a right to diminish or destroy it for the benefit of a particular body of its citizens, for a town or a city.

Smith v. Rochester should also be read in connection with *People v. Appraisers*, 33 N. Y. 461, which the Law Reviewer cites, although it has no bearing on the law of lakes or of still waters. In the latter case it is said of the former, "It will be observed that the case relates to the Mohawk river and an appropriation of its waters for the purpose of navigation alone—that being one of the uses which universally pertain to the rights of the sovereign in all navigable streams. . . . We think the authority of these cases should be confined to the waters of the Hudson and the Mohawk rivers."

It is to be observed further that the Mohawk river case affords no parallel to the Watuppa Pond cases in Massachusetts. The New York courts decided it upon the ground that the complainants had no proprietary rights in the Mohawk whatsoever; the State owned it, not only at the point where the diversion took place, but at the point where the complainants were established. Assuming this to be true, the result that the complainants had no claim for damages was inevitable; but obviously this is entirely irrelevant to the Massachusetts case, in which the State undertakes to divert the waters in its pond to the injury of the riparian proprietors' rights in their river. *Non constat* that under the New York decision a riparian owner on the Hudson, if the State were not deemed the owner of the latter also, could not have claimed damages if injured by the diversion from the Mohawk. This plain distinction appears to have been overlooked by the author.

or in any way materially diminishing the customary flow of the stream; and in delivering the opinion, the court said:—

“The first defence is that the defendant Norman has a right to intercept and appropriate the water because it comes to the surface on his own land, rising there in springs, and forming a pond. It is admitted, however, or at any rate it has been made to appear to the court, that the water, though rising on Norman's land, flows away from it over the land of the complainant, into her door-yard, in a natural and definite course or channel. To allow Norman, therefore, to intercept and appropriate it would be to allow him to deprive the complainant of a natural and immemorial privilege or easement appurtenant to her estate, and which is as much a part of her estate as the ground to which it appertains. At common law, of course, he has no right to do this.”

The Law Reviewer apparently admits the authority of this and of the preceding case, but says that the springs formed a portion of definite subterranean watercourses, and that the cases “tell us nothing about the law of lakes.” There is no finding in either of the cases as to a “definite subterranean watercourse,” and we suppose a spring may or may not be a portion of such a watercourse. It would be interesting, however, to have the distinction stated, if any there be, between the large pond formed by springs in the Rhode Island case, and the great pond formed by springs in the case of the North Watuppa Pond, or between the legal positions of the complainants in the two cases.

(4.) In *Clinton v. Myers*, 46 N. Y. 511, the plaintiff owned the land forming the boundaries, and at the outlet of “a natural pond of about forty acres.” This pond was formed by springs and surface-water during the rainy season, and by melting snows. This pond he utilized as a storage reservoir by means of a dam across and at its outlet for the benefit of his cotton-mill, three miles below, upon the outlet stream. The defendant, who owned a water-privilege and saw-mill on said stream, below the pond and above the cotton-mill, raised the gate in plaintiff's said dam, and let off large quantities of water. The court stated that “This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *Aqua currit et debet currere ut currere solebat.*” The writer complains again that nobody raised his point. That is true. Further he says, “The court only decided questions as to

unreasonable use of the dam." It was found that the use was most reasonable, and to the benefit of the defendant as well as of the plaintiff. But why decide such questions, when it would appear that the plaintiff owned the pond in the same sense that the State owned the North Watuppa, or in a larger sense?

(5.) *Schaefer v. Marthaler*, 34 Minn. 487, was an appeal from a judgment perpetually enjoining defendant from interfering with or diverting the course and flow of a lake or pond covering four and one-fourth acres in extent, situated partly on the plaintiff's land and partly on the defendant's land, "in a natural depression forming a basin, fed solely by surface-waters produced by rains and melting snows falling upon higher adjacent lands, and running naturally into such basin. . . . The character of the soil under the basin is such that it retains the water, so that the only waste is from evaporation, except during high water, for six or eight weeks in the year, when it overflows through a natural channel situate on defendant's land." The defendant claimed the right to drain the lake or pond "on the proposition that it is surface water." Held, that, under the common law, there is a marked difference in the rules governing in cases of surface-waters and those applicable to watercourses; that in this case the law of watercourses was to be applied and the injunction to be sustained. The court says:—

"And such waters, when they have ceased to spread and diffuse over the surface or percolate through the soil, when they have lost their casual and vagrant character, and have reached and come to rest in a permanent mass or body in a natural receptacle or reservoir, not spreading over or soaking into the soil, forming a mere bog or marsh,—cannot be regarded as surface-waters any more than they can be after they have entered into a stream. The mass or body of water constituting a lake or pond is an advantage or element of value to the lands upon which nature has placed it, of the same kind as is the watercourse to the lands through which nature has caused it to flow. There is no reason which can be suggested why the stream should be the property of each on his own land, of all the lands through which it flows, and why one owner should not prevent its flow as nature caused it to flow upon the land of another, that is not equally applicable to a body of water like this; and none can be suggested why the rights of the owners of the lands upon which nature has placed it should not be equal to the rights in respect to a stream. Applying the same rules that apply in respect to a watercourse, it would follow that no one is bound to keep his land as a water-shed to feed such a body of water, nor as a receptacle to retain the overflow from it; but that, in the reasonable and ordinary use or improvement of his land, he may interfere with or arrest the surface-waters before they reach such

body, or may drain off any bog or marsh on his land formed by the overflow, although the doing of either may incidentally affect the amount of water in the lake or pond. We therefore hold that defendant had not the right to drain off the lake."

Of this case the writer says, "They do not decide it to be a watercourse." But they do apply the law of watercourses thereto; and it should be noted that this is the only case thus far cited of a still pond. Except for the six or eight weeks of the year, when the overflow found a natural channel, its only loss was by evaporation. Had it been a pond like the North Watuppa, constantly fed by springs, and constantly overflowing through its outlet, there can be no doubt the court would have held it a watercourse in fact as well as in legal similitude. This distinction is well illustrated by the case next to be referred to. The writer says, "The point adjudicated was decided differently in a Massachusetts great pond case" (*Fay v. Salem Aqueduct Co.*, 111 Mass. 27). If so, that case was expressly put upon the Ordinance of 1647, which the court held changed the common law, and is therefore not in point for the writer.

(6.) In *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, it was held that a lake fed by springs, the water of which in times of flood finds exit by rapid percolations through a bed of gravel, so that there is a sensible current towards the gravel bed, is a running stream, and not merely surface water; and one who obstructs the flow to such place of discharge and thereby causes the water to overflow the lands of another is liable for the consequent damages. It was expressly held that a movement of the waters, though imperceptible to ordinary observation, would make a watercourse. The movement of the waters of the Watuppa ponds, though imperceptible in the body of the North Watuppa, was constant, and in natural open channels. *A fortiori* were they a watercourse.

(7.) In *Reid v. Gifford*, Hopkins Ch. 416, an injunction was granted to restrain the defendant, who had cut a subterranean passage upon his own land, which bordered upon Leigh's lake, by which he drew off a part of the water, sufficient to turn a saw-mill. The complainants were seised of certain lands, through which the outlet of Leigh's lake had flowed from time immemorial. The Chancellor said:—

"The new outlet was made by the defendant, Eli Gifford, through his own land; but he had no right to use his land in such manner as to deprive others of the enjoyment of their rights. He had no right to divert this water from its natural channel; that channel and the water flowing through it being the private property of the complainants."

The injunction was subsequently dissolved, upon the facts turning out otherwise than as alleged. If this lake was not a watercourse, then the diversion of a lake not a watercourse is actionable, if thereby the water flowing in the outlet stream is diminished to the detriment of riparian owners.

(8.) In *Bennett v. Murtaugh*, 20 Minn. 151, the plaintiffs operating mills upon the Le Sueur river, which was largely supplied with water from Lake Madison, obtained an injunction against the extension by the defendants of a ditch through a marsh towards the lake, about a mile distant from its outlet, the effect of which would be, at periods of high water when the lake overflowed the marsh, to divert water from the lake to the injury of the water-power of the plaintiffs. The court said:—

"As there is no question made as to the right of plaintiffs to the water-power used by them, and as it is found that a considerable part of such water-power is supplied from Lake Madison, the waters of which naturally flow into the Le Sueur river, . . . defendants cannot as against plaintiffs rightfully draw off or divert the waters of said lake."

It is true that the court did not say in terms that Lake Madison was a watercourse, nor determine anything about its current; but why should it?

(9.) Unfortunately in Massachusetts the question of the rights of riparian owners on an outlet stream arising from a diversion of the pond seems never to have arisen in the case of a pond not affected by the Colonial Ordinance. The great pond cases, however, are direct authority for such owners, because:—

First. It is the basic assumption in them all that the law, even as to littoral owners, would be different in case of ponds not affected by the ordinance.

Second. In the two cases where such rights were discussed independently of a water-supply act, able judges, delivering the opinions of the whole court, affirmed their rights.

Third. The decision in *Bailey v. Woburn*, and *Watuppa Reservoir Co. v. Fall River* (*supra*), where the question arose under a water-supply act, necessarily affirmed their rights.

The analogy which Chief Justice Shaw¹ thought to be a strong one, of "the owners of a mill with the privilege of a mill stream, and the riparian owner of land on a large pond supplying such mill stream" . . . "to that of riparian proprietors on a running stream," has never been doubted or denied, but has been affirmed in *Paine v. Woods*, 108 Mass. 160, which was a complaint under the mill acts for flowage damages by the littoral proprietor on a great pond. No question was made as to the liability of the miller on the outlet stream for such damages, and on the question of offsetting benefit to the littoral complainant, it was laid down that "the owner of the land thereby flowed . . . may use it [the water] for watering his cattle or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill owner." In this case, the right of the miller to an undiminished flow from a great pond is clearly affirmed, though, for all that appears, there was no perceptible current therein. The towns took *per formam doni* in *Bailey v. Woburn*, and *Watuppa Reservoir Company v. Fall River*, says the LAW REVIEW writer. The form of the grant in the latter case was this: "The city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property" by the taking of water from the pond. The form of the gift required payment for "property" taken and for nothing else. Unless, therefore, the mill-owners on Fall River had, in the opinion of the court, at that time a right of property in the flow of the stream undiminished by diversion from the Watuppa Ponds, the form of the gift to the city gave them no remedy. If, however, their "property" was taken, they had a remedy independently of the act.

We submit, therefore, that it has been settled by abundant authority that the riparian owner on the outlet stream of a pond not affected by some special ordinance, like the Ancient Charter of 1641-47, has a right of action for diversion of water from the

¹ *Barrett v. Cummings*, 10 Cush. 186.

pond, whether we consider a pond a watercourse or not; but in point of fact, the case of a pond like the North Watuppa meets all the requirements of a watercourse. It has defined banks and bed and a constant source of supply, and it *flows*, as all lakes of importance to water-power do flow, although not everywhere with perceptible current. "Flow," not "perceptible current," is the language of the cases on watercourses. If the water does not flow, it is unimportant for the purposes of this discussion, since it cannot provide water-power. In those lakes which are a part, either initial or incidental, of a natural waterway, the drop of water which reaches the defined boundaries of a pond "has reached the natural guide which is to compel it to the plaintiff's wheel," as much as if it had entered the river itself or a connecting stream. Unless lost by diversion or evaporation, it must get into the outlet stream sooner or later. The rate of flow in ponds, as well as in streams, can be scientifically determined by hydraulic engineers, and depends upon the size and form of the pond, and the relations they bear to inlet and outlet. For example: A small pond, situated between and connected with, two larger ones, will have a much more rapid flow than either of the larger ones. From the point of view of the miller or the engineer, it makes no difference whether the current is fast or slow, or even imperceptible; whether fast moving or slow moving, it will eventually be used as power, unless evaporated. The test of perceptible current is not a legal test; it is both unpractical and unscientific. Perceptible in what degree? it may be asked. To the eye; and to what eye? To one of powerful or of weak refraction? Again, must the water be perceived itself to move, or a chip upon its surface? and within what limit of time must the movement be determined, — instantaneously, or at an interval, as in the case of the hour-hand of the clock? In fine, what difference does it make whether we see it move or not, provided it does move, and consequently affords power below?

Let the reader cast his eye over a topographical survey of Massachusetts, and observe the network of ponds and lakes and rivers which form its waterways, each drainage basin having its own peculiar characteristics, according to the physical geography of its location. In some the water first collects in a pond or ponds, and then, by means of a river, runs directly to the sea; others have their sources in several ponds connected by streams,

while others again, first rising in springs or rivulets, form a river, which afterwards, in mid-course, opens into ponds or lakes; while the more important rivers are fed along their course at intervals by rivers either having their rise in ponds or flowing through them in some part of their course.¹ What is the "practical sense" of the matter? Are these component parts of defined water-channels, through which the drop, falling on the highest plane of the drainage basin, finds its way to the sea, to be divided according as the course of the stream is broad and slow moving, or narrow and swift, the water at one point being divertible, and at the next protected by the law? What practical sense can the miller see in the distinction without a difference between the damage done him by a diversion of the down-coming supply at a point above him on a pond, or at a point on the river above or below the pond? Wherever diverted, the effect on him is the same. On the other hand, he can well comprehend that his right to the flow of his stream past him is limited, and must be limited, like all other rights, by the rights of others, and consequently cannot extend to depriving his neighbors of such common and reasonable uses of their land as the felling of trees, the digging of wells, and the draining and improving thereof, although such uses may affect injuriously the flow of water which would otherwise exist.

Riparian owners on lakes or ponds do not interdepend as to their rights, says the author, "certainly not as riparians upon running water do. Therefore no similar body of law has come into existence to regulate lakes." And he adds: "It cannot be right to force the lake partners into the partnership of stream partners." It should be borne in mind always that the question

¹ For instance, taking 100 of the great ponds which contribute to the waters of the Nashua river:

	18	have no considerable stream entering.
	20	have 1 or more considerable streams entering.
	20	receive water from 1 pond.
12	"	" " 2 ponds.
10	"	" " 3 "
6	"	" " 4 "
4	"	" " 5 "
3	"	" " 6 "
2	"	" " 7 "
2	"	" " 8 "
3	"	" " 9 " [H. F. Mills.]

at issue has no relation to the interdependent rights, if any, of "lake partners." Whether or not they have the same right to insist upon the flow of the water past them that the owners on the stream have, it is of vastly less consequence to them, because, having no fall to utilize, they have no water-power. The correlated rights, if any, of lake proprietors in the reservoir of the lake cannot affect, and have no bearing upon, the rights of those interested in the water-power which falls from the lake. The assumption, however, is unfounded that they have no rights in common in the waters of the lake. In small ponds, less than ten acres in extent, they have always been understood to have an interest in common in the water and in the land thereunder. As to the waters above which flow into their lake, they have probably the legal right to insist that they shall flow undiverted to them, although they cannot make use of them for power, and hence the right is ordinarily of little moment. The discussion, however, is entirely irrelevant on a question arising between the riparian owners on the stream below and on the pond above.

Much of the argument with which the author seeks to support his thesis is in the form of rhetorical questions, founded on misconceptions of the actual nature of a pond, and based upon hypothetical conditions, often, we are compelled to think, geologically and hydraulically impossible.

In no lake which "has an outlet over which its surplus waters flow, when there are any, into a watercourse," can there exist a "changeless" body of water, though the lake itself lies "below the bed-rock of the outlet," perhaps a hundred feet deep. Every particle of water delivered at the inlet or supplied by springs beneath the surface must finally reach the outlet. There is a ceaseless interchange of particles throughout the length and breadth and height and depth of the pond; and if a condition so abnormal were physically possible, if the flow of the lake went on over such a layer of quiescent water, the case could present no difficulties. Every drop subtracted from beneath must be replaced by a drop from above, and the subtraction would operate as a direct diversion from the moving mass. As well allow the river bank to be cut through, or the bed to be excavated, as to allow a permanent bank or bed of water to be withdrawn. As well question the effect of diverting the water of a river by drawing from the bottom of the deep pools so frequently found in

streams, since these would have an equally "changeless bottom." It is not by raising difficulties of this character that a legal distinction of ponds from rivers can be proved. Once let it be conceded that a lake may, in law as in nature, be part of a watercourse, and no inconvenience will result, though it have as many outlets as the Mississippi. Once concede that the same rules as to diversion govern the stream and its source, and we need apprehend no trouble in disposing of questions of intermittent or inconstant flow, or of temporary drying up of the outlet stream.

It would hardly be profitable to follow our author throughout all his excursions into the realms of the supposititious. Brooks may, perhaps, in the future originate from ponds, though surely not in the manner described in the article; but the question of what rights will exist in respect to the new stream can have no bearing on the present discussion, and its decision would depend upon the same principles that would govern in case of any other watercourse newly developed as a result of physical changes taking place upon or below the surface of the earth; and would involve no greater difficulties. But let us consider a more probable case, in which a pond by the constant corrosive action of the water at its outlet, eating down the land to the bottom level, narrows into a river channel; can it for a moment be conceived that the change would impose any additional liability to pay for water withdrawn from the now river, indistinguishable as it is from the rest of the watercourse? And is it not obvious that no reason exists for the liability as to future diversions that did not exist equally before the work of nature had changed the superficial characteristics of the former lake? Or again, can it be supposed that if a river, as the result of a land-slide or other physical cataclysm, loses in the velocity of its current and expands into a sheet of placid and seemingly motionless water, of perhaps many acres, that the riparian owners below the point thus affected thereby lose their rights to the continued flow, and that by drawing from this newly created lake, the entire waters of the river may be taken without compensation? These questions are not founded upon purely imaginary states of facts. Such changes are, if infrequent, within the limits of experience, and they show the irrational nature of a rule which, if carried out, must in the one case add to a watercourse a section previously unrecognized as such, and in the other segregate a still continuous waterway into parts joined by an anomalous fragment, subject, we are told, to totally diverse rules of law.

The radical difficulty with the article arises from the assumption pervading it that if lakes and ponds cannot for all purposes be brought within the limits of the law relating to streams and rivers, questions concerning them must be remitted for decision to the principles applicable to land. Limiting the application of the law of watercourses by a definition based on an arbitrary distinction not referred to in the books, founded on no scientific fact and on no legal principle,—adopting as an immutable rule the fleeting and delusive test of perceptible motion, in disregard of physical conditions and logical requirements, it seeks by thus excluding lakes and ponds to show that they are not subject to the rules of law naturally governing them. But the limitation would be inadmissible even as matter of nomenclature. Ponds cannot be relegated to the domain of mere surface-water, nor can the flow from them be likened to the “passage of rains and melting snows” over the land. The great pond supplying a mill stream must be deemed in name, as in reality, the first segment of a “watercourse.” The river at some point in its course, flowing through a lake in which, from its size, the current is imperceptible, does not in law or in nature cease its existence as a “watercourse” at the one end and resume it at the other. The question is one of facts; and in either case, the pond, whether as the source, or as the connecting link, is a physical fact, necessary to and structurally a part of the stream. It is no longer the vagrant thing that Blackstone thinks “like a bird, to be of a wild, untamable nature;” the requisite possession of the water has been taken; it is confined by definite boundaries, and dedicated by the circumstances of its environment to the flow of the stream, as effectually as if running with the rapidity of the mountain cataract. Separated from the stream itself only by the thin and artificial distinction of the degree of motion, it bears no analogy to the “watery swamp;” and in every respect, save that of swiftness, has the characteristics of the “running river.” The swamp is, after all, but “watery” land, in which the owner may have the usual rights of digging and draining, while the pond is primarily a fixed body of water, such as the common law has never yet allowed the private owner to divert or drain to the damage of the owners of water-power below.

Samuel D. Warren.
Louis D. Brandeis.

THE DISSEISIN OF CHATTELS.

I.

THE readers of "The Seisin of Chattels," by Professor Maitland, in the "Law Quarterly Review" for July, 1885, were doubtless startled at the outset by the title of that admirable article. But all must have admitted at the end that the title was aptly chosen. The abundant illustrations of the learned author show conclusively that from the days of Glanvil almost to the time of Littleton, "seisin" and "possession" were synonymous terms, and were applied alike to chattels and land. In a word, seisin was not a purely feudal notion.

Is it possible, however, to justify the title of the present article? Is it also a mistake to regard disseisin as a peculiarity of feudalism? History seems to answer these questions in the affirmative. The word "disseisin," it is true, was rarely used with reference to personalty. Only three illustrations of such use have been found,¹ as against the multitude of allusions to seisin of chattels noted by Professor Maitland. In substance, however, the law of disseisin was common to both realty and personalty.

A disseisor of land, it is well known, gains by his tort an estate in fee simple. "If a squatter wrongfully incloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has inclosed. He is seised, and the owner of the waste is disseised. . . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs."² Compare with this the following, from Fitzherbert: "Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court;"³ or Finch's definition: "Trespass in goods is the wrongful taking of them with pretence of title, and therefore altereth the propertie of those goods."⁴

¹ 1 Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Edw. II 409.

² Williams, Seisin, 7. See also Leach v. Jay, 9 Ch. Div. 42, 44, 45.

³ Fitz. Ab. Tresp. 153.

⁴ Finch, Law. Book III. c. 6.

This altering of the property by a trespass is pointedly illustrated by a case from the "Book of Assizes."¹ The plaintiff brought a bill of trespass for carrying off his horse and killing it. "The defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was devested out of you and vested in us, and therefore we could not kill our own horse *contra pacem*." The bill was adjudged bad. Furthermore, incredible as it may appear, a disseisin by theft vested the property in the stolen chattel in the thief. *John v. Adam*² was a case of replevin in the *detinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant's hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which Herle, C. J., answered: "Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was." The opinion of this distinguished judge is confirmed by numerous cases in which stolen goods were forfeited by the thief, under the rule of law that gave to the Crown the chattels of felons. The goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels.³

These examples are sufficient to bring out the analogy between the tortious taking of chattels and the wrongful ouster from land. But in order to appreciate fully the parallel between disseisin of

¹ 27 Ass. pl. 64. See also Y. B. 2 H. IV. 12-51. There is a legal curiosity in 2 Roll. Ab. 553 [Q] 1, 2. "If my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser and not I; because, by the voluntary putting of the animals there without my consent, he gains a special property for the time, and so for this purpose they are his animals. But, *semble*, if my wife puts my beasts in another's land, I, myself, am trespasser, because the wife cannot gain a property from me."

² Y. B. 8 Ed. III. 10-30.

³ Y. B. 30 & 31 Ed. I. 508, 512, 512-514, 526; Fitzh. Coron. 95, 162, 318, 319, 367, 379, 392; Fitzh. Avow. 151; Dickson's Case, Hetl. 64. Under certain circumstances the victim of the theft might obtain restitution of the goods. But the cases cited in this note show the difficulties that must be surmounted.

chattels and disseisin of land, we must consider in some detail the position of the disseisor and disseisee in each case.¹

The disseised owner of land loses, of course, with the *res* the power of present enjoyment. But this is not all. He retains, it is true, the right *in rem*; or, to use the common phrase, he has still a right of entry and a right of action. But by an inveterate rule of our law, a right of entry and a chose in action were strictly personal rights. Neither was assignable. It follows, then, that the disseisee cannot transfer the land. In other words, as long as the disseisin continues, the disseised owner is deprived of the two characteristic features of property, — he has neither the present enjoyment nor the power of alienation.

These conclusions are fully borne out by the authorities. "The common law was," as we read in Plowden, "that he who was out of possession might not bargain, grant, or let his right or title; and if he had done it, it should have been void."² It was not until 1845 that by statute³ the interest of the disseisee of land became transferable. Similar statutes have been enacted in many of our States.⁴ In a few jurisdictions the same results have been obtained by judicial legislation.⁵ But in Alabama, Connecticut, Dakota, Florida, Kentucky, Massachusetts, New York, North Carolina, Rhode Island, and Tennessee, and presumably in Maryland and New Jersey, it is still the law that the grantee of a disseisee cannot maintain an action in his own name for the recovery of the land.⁶

A right of entry and action is now everywhere devisable. But

¹ For the best discussion of the doctrine of disseisin of land see Maitland "Mystery of Seisin," 2 L. Q. Rev. 481, to which the present writer is indebted for many valuable suggestions.

² Partridge v. Strange, Plow. 88, per Montague, C. J. See also Doe v. Evans, 1 C. B. 717, and 1 Platt, Leases, 50.

³ 8 & 9 Vict. c. 106, § 6. See Jenkins v. Jones, 9 Q. B. Div. 128.

⁴ Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, Vermont, Virginia, West Virginia, Wisconsin, Arizona, Idaho, Utah, Wyoming.

⁵ Delaware, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas.

⁶ Bernstein v. Humes (1877), 60 Ala. 582; Conn. Rev. Stat. (1875) 354, § 15; Dak. Civil C. § 681; Doe v. Roe (1869), 13 Fla. 602; Russell v. Doyle (1886), 84 Ky. 386, 388; Sohler v. Coffin (1869), 101 Mass. 179; Rawson v. Putnam (1880), 128 Mass. 552, 554; Webster v. Van Steenburgh (1864), 46 Barb. 211; Murray v. Blackledge (1874), 71 N. Ca. 492; Burdick v. Burdick (1884), 14 R. I. 574; Tenn. Code (1884), § 2446.

until 1838 in England and 1836 in Massachusetts, a disseisee had nothing that he could dispose of by will.¹

If we turn now from transfers by act of the party to transfers by operation of law, we find that in the one case of bankruptcy there was a true succession to the disseisee's right to enter or sue. But this was, of course, a statutory transfer.²

There was also a succession *sub modo* in the case of death. The heir of the disseisee, so long as he continued the *persona* of the ancestor, stood in his place. But the succession to the right *in rem* was radically different from the inheritance of the *res* itself. If the heir inherited the land, he became the feudal owner of it, and therefore at his death it descended to his heir, unless otherwise disposed of by deed or will. On the other hand, if a right of entry or action came to the heir, he did not become the absolute owner of the right. He could not hold a chose in action as tenant in fee simple. The right was his only in his representative capacity. He might, of course, reduce the right in action to possession, and so become feudal owner of the land. But if he died without gaining possession, nothing passed to his heir as such. The latter must be also the heir of the disseisee, and so the new representative of his *persona*, in order to succeed to the right *in rem*.

These two cases of death and bankruptcy were the only ones in which the disseisee's right was assignable by involuntary transfer. There was, for example, no escheat to the lord, if the disseised tenant died without heirs, or was convicted of felony. This doctrine would seem to have been strictly feudal. Only that could escheat which was capable of being held by a feudal tenure. A chose in action could not be held by such a tenure. Only the land itself could be so held. But the land, after the disseisin, was held by the disseisor. So long as his line survived, there was no "*defectus tenentis*." The death of the disseisee without heirs was, therefore, of no more interest to the lord than the death of any stranger.³

The lord was entitled to seize the land of his villein. But if

¹ 1 Jarm. Wills (4 ed.), 49; Poor v. Robinson, 10 Mass. 131; Mass. Rev. St. c. 62, § 2.

² Smith v. Coffin, 2 H. Bl. 444.

³ This principle was not maintained in its full integrity in the time of Coke. See Maitland, 2 L. Q. Rev. 486, 487, where the authorities are fully collected.

the villein had been disseised before such seizure, the lord could not enter upon the land in the possession of the disseisor, except in the name of the villein, and, after a descent cast, could not enter at all.¹ Nor had he any right to bring an action in the name of his villein.²

It is still the law in most of our States, as it was in England before 1833,³ that "if a man seised of land in fee be disseised of the same, and then take a wife and die without reëntering, she shall not have dower."⁴

The husband of a woman who was disseised before the marriage may, of course, enter upon the disseisor in his wife's name, or he may bring an action to recover the land in their joint names; but if the land is not recovered in the one way or the other before his wife's death, he must suffer for his laches. For the old rule, which denied to the husband curtesy in his wife's right of entry or action, has not lost its force on either side of the ocean.⁵ It was applied in New York, to the husband's detriment, as recently as 1888.⁶

One more phase of the non-assignability of the disseisee's right of action is shown by another recent case. It was decided in Rhode Island in 1879, in accordance with a decision by the King's Bench, in the time of James I.,⁷ that a disseised owner of land had nothing that could be taken on execution.⁸

The position of the disseisor of land is, in most respects, the direct opposite of that of the disseisee. The strength of each is the weakness of the other. The right of the disseisee to recover implies the liability of the disseisor, or his transferee, to lose the land. But so long as the disseisin continues, the disseisor,

¹ Co. Lit. 118 b.

² Co. Lit. 117 a.

³ 3 & 4 Wm. IV. c. 105.

⁴ Perk. § 366; *Thompson v. Thompson*, 1 Jones (N. Ca.), 431; 1 Washb. R. P. (5 ed.) 225, 226.

⁵ 2 L. Q. Rev. 486; 1 Bishop, Mar. W. § 509; *Den v. Demarest*, 1 Zab. 525, 542.

⁶ *Baker v. Oakwood*, 49 Hun, 416.

⁷ *Stamere v. Amoyne*, 1 Roll. Abr. 888, pl. 5.

⁸ *Campbell v. Point St. Works*, 12 R. I. 452. *McConnell v. Brown*, 5 Mon. 478, *accord*. By statute or judicial legislation a different rule prevails in some jurisdictions. *Doe v. Haskins*, 15 Ala. 619; *McGill v. Doe*, 9 Ind. 306; *Blanchard v. Taylor*, 7 B. Mon. 645; *Hanna v. Renfro*, 32 Miss. 125, 130; *Rogers v. Brown*, 61 Mo. 187 (*semble*); *Truax v. Thorn*, 2 Barb. 156; *Jarrett v. Tomlinson*, 3 Watts & S. 114; *Kelley v. Morgan*, 3 Yerg. 437.

or his transferee, possesses all the rights incident to the ownership of an estate in fee simple. He has the *jus habendi* and the *jus disponendi*. If he is dispossessed by a stranger, he can recover possession by entry or action.¹ If he wishes to transfer his estate in whole or in part, he may freely do so. He may sell the land,² or devise it,³ or lease it.⁴ His interest is subject also to the rules of involuntary transfer. Accordingly, it may descend to his heir,⁵ escheat to his lord,⁶ or be taken on execution,⁷ and would doubtless pass to his assignee in bankruptcy. The husband of the disseisor has curtesy,⁸ and the wife dower,⁹ and a disseisin by a villein must have enured to the benefit of his lord at the latter's election.

The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto*. This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his "usurpation."¹⁰ If the taking was felonious,¹¹ the despoiled owner might bring an appeal of larceny, and, by complying with certain conditions,¹² obtain restitution of the stolen chattel. But such was the rigor and hazard of

¹ Bract. 165 a; Bateman v. Allen, Cro. Eliz. 437, 438; Asher v. Whitlock, L. R. 1 Q. B. 1.

² Christy v. Alford, 17 How. 601; Weber v. Anderson, 73 Ill. 439.

³ Asher v. Whitlock, L. R. 1 Q. B. 1; Haynes v. Boardman, 119 Mass. 414.

⁴ 1 Platt, Leases, 51.

⁵ Watkins, Descents (4 ed.), 4, n. (c); Currier v. Gale, 9 All. 522.

⁶ 2 L. Q. Rev. 487, 488.

⁷ Sheetz v. Fitzwalter, 5 Barr, 126; Talbot v. Chamberlain, 3 Paige, 219; Murray v. Emmons, 19 N. H. 483.

⁸ Colgan v. Pellew, 48 N. J. 27; 49 N. J. 694.

⁹ Hale v. Munn, 4 Gray, 132; McEntire v. Brown, 28 Ind. 347; Randolph v. Doss, 4 Miss. 205; 1 Scribner, Dower, 255, 256, 353, 354.

¹⁰ 1 Nich. Britt. 57, 116. The right of self-help in general was formerly greatly restricted. The disseisor's right of entry into land was tolled after five days. If he entered afterwards, the disseisor could recover the land from him by assize of novel disseisin. Maitland, 4 L. Q. Rev. 29, 35. So the writ of ravishment of ward would lie against one entitled to the ward if he took the infant by force from the wrongful possessor. Y. B. 21 & 22 Ed. 1. 554. The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem*. 4 L. Q. Rev. 31. A nuisance could be abated by act of the party injured, only if he acted immediately. Bract. f. 233; 1 Nich. Br. 403.

¹¹ Originally any taking without right, like killing by accident, was felonious. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bract. f. 136 b.

¹² See cases cited *supra*, p. 24, n. 3.

these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.¹ If the taking was not criminal, trespass was for generations the only remedy.²

Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost the *res*, but had no right *in rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken.

What became of the chattel afterwards, therefore, was no concern of the victim of the tort. Accordingly, one need not be surprised at the following charge given by Brian, C. J., and his companions to a jury in 1486: "If one takes my horse *vi et armis* and gives it to S, or S takes it with force and arms from him who took it from me, in this case S is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty."³ Brooke adds this gloss, "For the first offender has gained the property by the tort."⁴

¹ A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are recorded during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviatio Placitorum*, twenty-five cases are given of the single year 1252-1253. We may infer that the writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass rather than by appeal, in order to avoid "*la perilouse aventure de batayles*." Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, *Placita Anglo-Normannica*, 89, 89, 98, 102, 127.

² In early English law, as in primitive law in general, the principle of parsimony did not permit concurrent remedies. The lines were drawn between the different actions with great sharpness. The right to sue a trespasser in replevin and detainue was a later development, as will be explained further on.

³ Y. B. 21 Ed. IV. 74-6. See to the same effect Bro. Ab. Ej. Cust. 8, and Tresp. 256; Y. B. 2 Ed. IV. 5-9 *per* Needham, J.; Y. B. 4 H. VII. 5-1; Y. B. 16 H. VII. 3, 2-7; Staunf. Pl. Cor. 61, 2; Harris v. Blackhole, Brownl. 26.

⁴ Bro. Ab. Tresp. 358.

The complete divestiture of the owner's property in a chattel by a disseisin explains also a distinction taken in the Year Books, which has proved a stumbling-block to commentators to the present day: "Note by Fineux, C. J., and Tremayle, C. J. If I bail goods to a man and he gives them to a stranger or sells them, if the stranger takes them without livery he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed but by the taking. But if he delivered them to the vendee or donee, then I shall not have trespass."¹ At this time, although anciently the rule was otherwise, the possession of the bailee at will was treated as the possession of the bailor also. In the first case, therefore, where there was no delivery by the bailee, the stranger by taking the goods disseised the bailor and so was liable to the latter in trespass. But in the other case, where the bailee delivered the goods sold, he was the disseisor. By a single act he gained the absolute property in the goods and transferred it to the vendee, who was thus as fully beyond the reach of the disseisee as the vendee of the disseising trespasser in the earlier case before Brian, C. J. The peculiarity in the case of the bailment lies in the form of the disseisin. But the asportation of a chattel or the ouster from land, although the commonest, were not the only modes of disseisin. Any physical dealing with the chattel under an assumption of dominion, or, to borrow a modern word, any conversion, was a disseisin. The wrongful delivery of the goods by the bailee as vendor corresponds perfectly to a tortious feoffment by a termor. Such a feoffment was a disseisin of the landlord; and the feoffor, not the feoffee, was the disseisor.² The act of feoffment was at once an acquisition of a tortious fee and a conveyance.³

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be

¹ Y. B. 21 H. VII. 39-49. See also Y. B. 2 Ed. IV. 5-9. 2 Wms. Saund. 47 c; Wright & Pollock, Possession, 169.

² Bract. 161 b; Sparks Case, Cro. El. 676; Co. Lit. 57 a, n. (3); Booth, R. Act. (2d ed.) 285; 2 L. Q. Rev. 488.

³ The conveyance was not necessarily coextensive with the acquisition. If the feoffment was for life the reversion was in the feoffor. Challis, R. Prop. 329.

traced in the expansion of the writs of replevin and detinue, and is sufficiently curious to warrant a slight digression.

Replevin was originally confined to cases of wrongful distress. It was also the only action in those cases, trespass not being admissible.¹ A distrainer, unlike a disseisor, did not take the chattel under a claim of absolute dominion, but only as a security. He had not even so much possession as a bailee. If the distress was carried off by a stranger, the distrainer could not maintain trespass,² in which action the goods were always laid as the goods of the plaintiff. That action belonged to the distrainee, as the one disseised. The distrainer must use either the writ of *rescous* or *de parco fracto*, in which the property in the distress was either laid in the distrainee, or not laid in any one. Trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against the custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought.³ If, therefore, when the sheriff came to replevy goods, as if distrained, the taker claimed them as his own, the sheriff was powerless. The writ directed him to take the goods of the plaintiff, detained by the defendant. But the defendant by his claim had disseised the plaintiff and made them his own. The plaintiff must abandon his action of replevin as misconceived, and proceed against the defendant, as a disseisor, by appeal of felony, or trespass.⁴

Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion,

¹ Ab. Pl. 265, col. 2, rot. 5; 5 Rot. Par. 139 b.

² Y. B. 20 H. VII. 1-1; Rex v. Cotton, Park. 113, 121.

³ Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the "*contrairiositie*" of the supposal of the two writs. Y. B. 8 H. VI. 27-17; 22 H. VI. 15-26; 14 H. VII. 12-32.

⁴ 1 Nich. Britt. 138. "If the taker or detainer admit the bailiff to view and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not villein of the deforceor, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." Compare the case of an estray. 1 Nich. Britt. 68. "If the law avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony."

without proof, of ownership. The goods were returned to him as goods wrongfully replevied, and the plaintiff, as before, was driven to his appeal or trespass.¹

The law was so far changed by the judges in 1331, that if the defendant allowed the sheriff to take the goods, he could not afterwards abate the action by a claim of title.²

But it was still possible for the defendant to claim property before the sheriff and so arrest further action by him. To meet this difficulty, the writ *de proprietate probanda* was devised, probably in the reign of Edward III. By this writ the sheriff was directed to replevy the goods, notwithstanding the defendant's claim, if by an inquest of office the property was found in the plaintiff's favor. This finding for the plaintiff had no further effect than to justify the sheriff in replevying the goods, and thus to permit the plaintiff to go on with the replevin action, just as he would have done had the defendant allowed the sheriff to take the goods.³ Replevin thus became theoretically concurrent with trespass.⁴ A disseisor could not thereafter gain the absolute property by his tort. A writ in trespass for carrying off and killing the plaintiff's horse was no longer assailable for repugnancy. In 1440, to a count

¹ Y. B. 21 & 22 Ed. I. 106; Y. B. 32 & 33 Ed. I. 54. If the defendant, instead of claiming title in himself, alleged title in a third person, he could only defeat the action by proof of the fact alleged. Y. B. 32 Ed. I. 82; Y. B. 34 Ed. I. 148.

² Y. B. 5 Ed. III. 3-11. The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. See also Y. B. 21 Ed. IV. 64 a-35, and Y. B. 26 H. VIII. 6-27. There is an echo of the old law in Y. B. 7 H. IV. 28 b-5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary — *credo quod non est lex*."

³ Y. B. 1 Ed. IV. 9-18.

⁴ Y. B. 7 H. IV. 28 b-5, *per* Gascoigne, C. J.; Y. B. 19 H. VI. 65-5, *per* Newton, C. J.; Y. B. 2 Ed. IV. 16-8, *per* Danby, C. J.; Y. B. 6 H. VII. 7-4, *per* Brian, C. J., and Vavasor, J.; Y. B. 14 H. VII. 12-22. In fact, there are no reported cases of replevin for trespass from the time of Edward III. to the present century. See *Mellor v. Leather*, 1 E. & B. 619. Almost at the same time that the scope of replevin was enlarged, there was a similar duplication of remedies against the disseisor of land. Originally, if we except the writ of right, the assize of novel disseisin (or writ of entry in the nature of assize), which was the counterpart of trespass *de bonis asportatis*, was the exclusive remedy against a disseisor. Trespass *quare clausum fregit* was confined to cases of entry not amounting to an ouster. If, therefore, the defendant in a writ of trespass claimed the freehold, the writ was abated. The plaintiff must proceed against him as a disseisor by the assize. 2 Br. Note Book, 378; Ab. Pl. 142, col. 1, rot. 9 [1253]; Ab. Pl. 262, col. 1, rot. 18 [1272]. About 1340, trespass *quare clausum* was allowed for a disseisin. Y. B. 11 & 12 Ed. III. 503-505, 517-519; Y. B. 14 Ed. III. 231.

in trespass for taking a horse, the defendant pleaded that he took it *damage feasant* to his grain, which the plaintiff had carried off. It was objected that the plea was bad, as showing on its face that the grain was the plaintiff's by the taking. But the court allowed the plea on the ground that the defendant might have brought a replevin for the grain which proved the property in him at his election.¹ It became a familiar notion that the dispossessed owner might affirm the property in himself by bringing replevin, or disaffirm it by suing in trespass.² In other words, there was a disseisin by election in personalty as well as in realty.

The disseisee's right *in rem*, however, was still a qualified right; for replevin was never allowed in England against a vendee or bailee of a trespasser, nor against a second trespasser.³ It was only by the later extension of the action of detinue that a disseisee finally acquired a perfect right *in rem*. Detinue, although its object was the recovery of a specific chattel, was originally an action *ex contractu*. It was allowed only against a bailee or against a vendor, who after the sale and before delivery was in much the same position as a bailee. So essential was the element of privity at first, that in England, as upon the Continent, during the life of a bailee, he only was liable in detinue even though the chattel, either with or without the bailee's consent, were in the possession of a third person.⁴ In counting against a possessor after the bailee's death, the bailor must connect the defendant's possession with that of the bailee, as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him.⁵ Afterwards, a bailor was permitted to charge a sub-bailee in detinue in the lifetime of the bailee.⁶ This action seems to have been given to a loser as early as the reign of Edward III.⁷ But it was a long time before the averment of the plaintiff's loss of his goods became a fiction. As late as

¹ Y. B. 19 H. VI. 65-5.

² Br. Ab. Replev. 39; Y. B. 6 H. VII. 8 b-4; Y. B. 14 H. VII. 12-22; Russell v. Pratt, 4 Leon. 44-46; Bishop v. Montague, Cro. Eliz. 824; Bagshaw v. Gaward, Velv. 96; Coldwell's Case, Clayt. 122, pl. 215; Power v. Marshall, 1 Sid. 172; 1 Roper, H. & W. (Jacob's ed.) 169.

³ Mennie v. Blake, 6 E. & B. 847.

⁴ Y. B. 24 Ed. III. 41 a-22; Y. B. 43 Ed. III. 29-11.

⁵ Y. B. 16 Ed. II. 490. But see Y. B. 9 H. V. 14-22.

⁶ Y. B. 11 H. IV. 46 b-20; Y. B. 10 H. VII. 7-14.

⁷ Y. B. 2 Ed. III. 2-5.

1495, the conservative Brian, C. J., said, "He from whom goods are taken cannot have detinue."¹ His companion, Vavasor, J., it is true, expressed a contrary opinion in the same case, as did Anderson, C. J., in *Russell v. Pratt*² (1579), and the court in *Day v. Bisbitch*³ (1586). But it was not until 1600 that Brian's opinion can be said to have been finally abandoned. In that year the comparatively modern action of trover, which had already nearly supplanted detinue *sur trover*, was allowed against a trespasser; although even then two judges dissented, because by the taking "the property and possession is divested out of the plaintiff."⁴ As the averments of losing and finding were now fictions, trover was maintainable by the disseisee against any possessor.

The disseisee's right to maintain replevin and detinue (or trover) being thus established, we have now to inquire how far the rules which were found to govern in the disseisin of land apply to the disseisin of goods.

So long as the adverse possession continues, the dispossessed owner of the chattel has, manifestly, no power of present enjoyment. Has he lost also the power of alienation? His right *in rem*, if analyzed, means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows, then, that they were not transferable. And such was the law.

In 1462, Danby, C. J., and Needham, J., agreed, it is true, that a bailor whose goods had been wrongfully taken from the bailee might give them to the trespasser.⁵ This was against the opinion of Littleton, counsel for the plaintiff, who said, "I think it is a void gift; for when S. took them from me [bailee] the property was in him and out of you [bailor]; how, then, could you give them to him?" "*Et bene dixit*," is Brooke's comment.⁶ The view of the two judges was taken by Vavasor, J., also, in a like case in 1495. But one of the greatest of English judges, Brian, C. J., expressed himself clearly to the contrary: "The gift is void. . . . In my opinion the property is devested by the taking, and

¹ Y. B. 6 H. VII. 9-4. See also 1 Ch. Pl. (7 ed.) 137.

² 4 Leon. 44, 46.

³ Ow. 70.

⁴ *Bishop v. Montague*, Cro. El. 824, Cro. Jac. 50.

⁵ Y. B. 2 Ed. IV. 16-8; Perk. § 92.

⁶ Bro. Ab. Replev. 39.

then he had only a right of property; and so the property and right of property are not all one. Then, if he has only a right, this gift is void; for one cannot give his right."¹ Three years later he reaffirmed his opinion in the same case: "The gift is void to him who had the goods as much as it would be to a stranger, and I think a gift to a stranger is void in such a case."²

In *Russell v. Pratt*³ (1579) there is this *dictum* by Manwood, C. B.: "If my goods be taken from me, I cannot give them to a stranger; but if my goods come to another by trover, I may give them over to another." The law on this point is thus summarized in "Shepard's Touchstone," the first edition of which was published in 1648: "Things in action are not grantable over to strangers but in special cases. . . . And, therefore, if a man have disseised me of my land or taken away my goods, I may not grant over this land or these goods until I have seisin of them again. . . . And if a man take goods from me, or from another man in whose hands they are; or I buy goods of another man and suffer them in his possession, and a stranger takes them from him, it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me [*i. e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or resumption by recaption]."⁴ The bracketed part of this extract was added in 1820 by Preston, the learned editor of the sixth edition. No later allusion to this subject has been found in the English books; but there are several American decisions which might have been given by Brian himself. In *McGoon v. Ankeny*⁵ (1850), for instance,

¹ Y. B. 6 H. VII. 9-4.

² Y. B. 10 H. VII. 27-13.

³ 4 Leon. 44, 46. See also *Rosse v. Brandstide*, 2 R. & M. R. 438, 439; *Benjamin v. Bank*, 3 Camp. 417.

⁴ *Shep. Touch.* (6 ed.) 240, 241.

⁵ 11 Ill. 558. To the same effect, *Goodwyn v. Lloyd*, 8 Port. 237; *Brown v. Lipscomb*, 9 Port. 472; *Dunkin v. Williams*, 5 Ala. 199; *O'Keefe v. Kellogg*, 15 Ill. 347; *Taylor v. Turner*, 87 Ill. 296 (*semble*); *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Young v. Ferguson*, 1 Litt. 298; *Gardner v. Adams*, 12 Wend. 297; *Morgan v. Bradley*, 3 Hawks, 559; *Stedman v. Riddick*, 4 Hawks, 29; *Overton v. Williston*, 31 Pa. 155.

But see *contra*, *Tome v. Dubois*, 6 Wall. 548; *Brig Sarah Ann*, 2 Sumn. 206, 211 (*semble*); *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; *Smith v. Kennett*, 18 Mo. 154; *Hall v. Robinson*, 2 Comst. 296 (*semble*); *Kimbro v. Hamilton*, 2 Swan, 190.

Compare *Holly v. Huggerford*, 8 Pick. 73; *Boynton v. Willard* 10 Pick. 166; *Carpenter v. Hale*, 8 Gray, 157, 158; *Clark v. Wilson*, 103 Mass. 219, 222.

the *ratio decidendi* was thus expressed by the court : " While the property was thus held adversely, the real owner had but a right of action against the person in possession, which was not the subject of legal transfer." And the case was followed in Illinois in 1887.¹ Again we read, in *Overton v. Williston*² (1858) : " If one wrongfully converts the property of another to his own use, and continues in adverse enjoyment of it, the owner cannot sell to a third person, so as to give his vendee a right of action in his own name."

Not much is to be found in the books as to one's power to dispose, by will, of chattels adversely held. It is plain, however, that before 1330 the disseisee had nothing that he could bequeath. At that time the only remedies for a wrongful taking were trespass and the appeal of felony, both of which actions died with the person wronged.³ A statute in that year gave to the executor an action to recover damages against a trespasser in like manner as the testator might have recovered if living.⁴ The executor of a distrainee or bailor could maintain replevin or detinue, as the testator had the property at his death. After these actions were allowed against a trespasser, since the right to maintain them proved property in the dispossessed owner at his election, his executor could use them as well as trespass against a trespasser.⁵ It was, however, only a right of action that the executor acquired in such a case. The chattels themselves passed to the executor only when the testator died in possession. An executor counting on his title regularly stated that the testator died seised.⁶ In abridging one case, Fitzherbert adds, " And so see that dying seised of goods is material."⁷ Finch's statement also is explicit : " All one's own chattels, real . . . or personal, but not those he is only to recover damages for, as in goods taken from him, or to be accounted for, . . . may be given away or devised by his testament."⁸

The analogy between chattels and lands in regard to the assignability of the disseisee's interest holds good also, with one exception, in the case of involuntary transfers. Thus the bank-

¹ *Erickson v. Lyon*, 26 Ill. Ap. 17.

² 31 Pa. 155, 160.

³ Staunf. Pl. Cor. 60, b.

⁴ 4 Ed. III. c. 7.

⁵ *Russell v. Pratt*, 4 Leon. 44 ; *Le Mason v. Dixon*, W. Jones, 173.

⁶ Y. B. 47 Ed. III. 23-55 ; *Fitz. Ab. Replic.* 70 ; Y. B. 7 H. VI. 35-36 ; Y. B. 28 H. VI. 4-19. See *Hudson v. Hudson*, Latch, 214.

⁷ *Fitz. Ab. Replic.* 60.

⁸ *Finch, Law*, Bk. 2, c. 15.

rupt's right to recover possession of goods wrongfully taken passes by true succession to the statutory assignee.¹ But it is only a chose in action that passes, not the goods themselves.²

In case of death, the administrator represents the *persona* of the intestate, as the heir stood in the place of the ancestor.

The one exception to the parallel between land and goods is the case where the dispossessed owner of a chattel died intestate, leaving no next of kin, or was convicted of felony or outlawed. His right of action vested in the Crown, in the first case as *bonum vacans*, in the others by forfeiture. The king, unlike a feudal lord, claiming by escheat, was a true successor. He was also entitled to choses in action as well as to choses in possession; for the sovereign, whether as assignor or assignee, was an exception to the rule that choses in action are not assignable, unless the claim was for a battery or other personal injury. In 1335 an outlaw who had been pardoned brought an action of trespass for a battery committed before the outlawry. As a pardon did not carry with it a restoration of anything forfeited, it was objected that the claim was extinguished. But the court gave judgment for the plaintiff. Shard (Sharshull, C. J.?) saying, "If this were an action for goods and chattels carried off . . . peradventure it would not be entertained; because if goods had been in the outlaw's possession, the king would have them, and for the like reason, the king should have his action against those who wrongfully took them. But here the wrong would go unpunished if the action were not allowed."³

The lord of a villein was entitled to the latter's chattels if he elected to claim them. But he must, at his peril, make his election before the villein was disseised. The villein's chose in action against the disseisor was not assignable.⁴

¹ *Edwards v. Hooper*, 11 M. & W. 363.

² "Where the conversion takes place before the bankruptcy, the assignees have a right of action, but have not the property in the goods," Lord Abinger, in *Edwards v. Hooper*, 21 L. J. Ex. 304, 305. The learned Chief Baron evidently used "property" as Brian, C. J., did, in contradistinction to right of property.

³ Y. B. 29 Lib. Ass. pl. 63. See also Y. B. 6 H. VII. 9-4, and 10 H. VII. 27-13.

⁴ "If the beasts of my villein are taken in name of distress, I shall have a replevin, although I never seized them before, for the property is in my villein, so that suing of this replevin is a claim which vests the property in me. But it is otherwise if he who took the beasts claimed the property." Fitz. Ab. Replevin, 43. Coke, following Fitzherbert, says: "If the goods of the villein be taken by a trespass, the lord shall have no replevin, because the villein had but a right." Co. Lit. 145 b.

There is nothing in the law of personalty corresponding to dower in land. But the husband's right to his wife's chattels may be compared to his right of curtesy in her land. As was seen, the husband of a woman who was not seised of the land during the marriage was not entitled to curtesy. So a man who married a disseisee of chattels acquired no interest therein, unless during the marriage he reduced her right *in rem* to possession by recaption or by action in their joint names. Her right of action, in other words, was no more assignable than that of a villein. Fitzherbert treated the two cases as illustrations of the same principle.¹ The doctrine was clearly stated by the court in *Wan v. Lake*.² "If the wife had been dispossessed [of the term] before marriage, and no recovery during the coverture, the representative of the wife should have the term and not the husband, because it is then a chose in action." The rule has been applied, in a number of cases, to chattels personal.³

Finally, the disseisee of a chattel, like the disseisee of land, has at common law nothing that can be taken on execution. In a valuable book published in 1888 we read: "When personal property is held adversely to its owner, his interest therein is a mere chose in action and cannot be reached by execution, unless by the provisions of some statute."⁴

The position of the disseisor of a chattel was the converse of that of the disseisee. The converter, like the disseisor of land, had the power of present enjoyment and the power of alienation. If dispossessed by a stranger, he might proceed against him by trespass, replevin, detinue, or trover.⁵ He could sell the

¹ Fitz. Ab. Replevin, 43.

² Gilb. Eq. 234. See also Co. Lit. 351 a, b; 4 Vin. Ab. 53; Y. B. 20 Ed. I. 174; Milne v. Milne, 3 T. R. 627.

³ Magee v. Toland, 8 Port. 36 (*semble*); McNeil v. Arnold, 17 Ark. 154, 178 (*semble*); Fightmaster v. Beasley, 1 J. J. Marsh. 606; Duckett v. Crider, 11 B. Mon. 188, 191 (*semble*); Sallee v. Arnold, 32 Mo. 532, 540 (*semble*); Johnston v. Pasteur, Cam. & Nor. 464; Norfeit v. Harris, Cam. & Nor. 517; Armstrong v. Simonton, 2 Tayl. 266, 2 Murph. 351, s. c.; Spiers v. Alexander, 1 Hawks, 67, 70 (*semble*); Ratcliffe v. Vance, 2 Mill, Const. R. 239, 242 (*semble*); Harrison v. Valentine, 2 Call, 487, cited. See also 1 Bishop, Mar. Wom. § 71. But see *contra*, Wellborne v. Weaver, 17 Ga. 267, 270 (*semble*); Pope v. Tucker, 23 Ga. 484, 487 (*semble*).

⁴ Freeman, Executions (2d ed.), s. 112. See to the same effect Wier v. Davis 4 Ala. 442; Horton v. Smith, 8 Ala. 900; Doe v. Haskins, 15 Ala. 620, 622 (*semble*); Thomas v. Thomas, 2 A. K. Marsh. 430; Commw. v. Abell, 6 J. J. Marsh. 476.

⁵ Bro. Ab. Tresp. 433; Maynard v. Bassett, Cro. El. 819; Woodson v. Newton, 2 Str. 777.

chattel¹ or bail it.² It would go by will to the executor or be cast by descent upon the administrator;³ was forfeited to the Crown for felony;⁴ and was subject to execution. A conversion by the wife, unless the property was destroyed, was necessarily to the use of the husband,⁵ as a disseisin by a villein must have profited his lord if the latter claimed it.

We have thus far considered only the resemblances between land and chattels in the matter of seisin and disseisin. But our comparison would be incomplete if attention were not called to one point of difference. One in possession of a horse or cow was seised of the chattel itself, without more. There could, therefore, be but a single seisin of it at any given moment. If, for instance, a chattel was loaned for a term, the bailee alone was seised of it. He, and he only, could be disseised of it. To this day the bailor for a term cannot maintain trespass or trover against a stranger for a disseisin of the bailee. But, on the other hand, there was no such thing as seisin of land *simpliciter*. The seisin was always qualified by the mode of possession. One was seised either *ut de feodo vel libero tenemento*, or else *ut de termino*. Accordingly, wherever there was a term there were necessarily two distinct seisins in one and the same land, at one and the same time. Both of these seisins were lost by the tortious entry of a stranger upon the land under a claim of right, and the disseisor was exposed to two actions, — the assize of novel disseisin by the freeholder, and the *ejectio firmæ* by the termor. This difference between land and chattels is obviously artificial and of feudal origin.

But if this historical sketch has been accurately drawn, the disseisin of land finds its almost perfect counterpart in the conversion of chattels, notwithstanding the difference here indicated. It is still true that the doctrine of disseisin belongs not to feudal-

¹ James v. Pritchard, 7 M. & W. 216; Bigelow, Estoppel (4th ed.), 489, 490; Bohannon v. Chapman, 17 Ala. 696.

² Shelbury v. Scotsford, Yelv. 23; Bigelow, Estoppel, 490.

³ Normont v. Smith, 1 Humph. 46, Moffatt v. Buchanan, 11 Humph. 369, are *contra*. But these decisions seem indefensible.

⁴ *Supra*, p. 24, n. 3; Y. B. 6 H. VII. 9-4.

⁵ Hodges v. Sampson, W. Jones, 443; Keyworth v. Hill, 3 B. & Ald. 685. In Tobey v. Smith, 15 Gray, 535, a count alleging a conversion by the wife of A to their use was adjudged bad on demurrer. The conversion should have been laid to the use of the husband only.

The complete divestiture of the owner's property in a chattel by a disseisin explains also a distinction taken in the Year Books, which has proved a stumbling-block to commentators to the present day: "Note by Fineux, C. J., and Tremayle, C. J. If I bail goods to a man and he gives them to a stranger or sells them, if the stranger takes them without livery he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed but by the taking. But if he delivered them to the vendee or donee, then I shall not have trespass."¹ At this time, although anciently the rule was otherwise, the possession of the bailee at will was treated as the possession of the bailor also. In the first case, therefore, where there was no delivery by the bailee, the stranger by taking the goods disseised the bailor and so was liable to the latter in trespass. But in the other case, where the bailee delivered the goods sold, he was the disseisor. By a single act he gained the absolute property in the goods and transferred it to the vendee, who was thus as fully beyond the reach of the disseisee as the vendee of the disseising trespasser in the earlier case before Brian, C. J. The peculiarity in the case of the bailment lies in the form of the disseisin. But the asportation of a chattel or the ouster from land, although the commonest, were not the only modes of disseisin. Any physical dealing with the chattel under an assumption of dominion, or, to borrow a modern word, any conversion, was a disseisin. The wrongful delivery of the goods by the bailee as vendor corresponds perfectly to a tortious feoffment by a termor. Such a feoffment was a disseisin of the landlord; and the feoffor, not the feoffee, was the disseisor.² The act of feoffment was at once an acquisition of a tortious fee and a conveyance.³

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be

¹ Y. B. 21 H. VII. 39-49. See also Y. B. 2 Ed. IV. 5-9. 2 Wms. Saund. 47 c; Wright & Pollock, Possession, 169.

² Bract. 161 b; Sparks Case, Cro. El. 676; Co. Lit. 57 a, n. (3); Booth, R. Act. (2d ed.) 285; 2 L. Q. Rev. 488.

³ The conveyance was not necessarily coextensive with the acquisition. If the feoffment was for life the reversion was in the feoffor. Challis, R. Prop. 329.

traced in the expansion of the writs of replevin and detinue, and is sufficiently curious to warrant a slight digression.

Replevin was originally confined to cases of wrongful distress. It was also the only action in those cases, trespass not being admissible.¹ A distrainer, unlike a disseisor, did not take the chattel under a claim of absolute dominion, but only as a security. He had not even so much possession as a bailee. If the distress was carried off by a stranger, the distrainer could not maintain trespass,² in which action the goods were always laid as the goods of the plaintiff. That action belonged to the distrainee, as the one disseised. The distrainer must use either the writ of *rescous* or *de parco fracto*, in which the property in the distress was either laid in the distrainee, or not laid in any one. Trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against the custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought.³ If, therefore, when the sheriff came to replevy goods, as if distrained, the taker claimed them as his own, the sheriff was powerless. The writ directed him to take the goods of the plaintiff, detained by the defendant. But the defendant by his claim had disseised the plaintiff and made them his own. The plaintiff must abandon his action of replevin as misconceived, and proceed against the defendant, as a disseisor, by appeal of felony, or trespass.⁴

Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion,

¹ Ab. Pl. 265, col. 2, rot. 5; 5 Rot. Par. 139 b.

² Y. B. 20 H. VII. 1-1; Rex v. Cotton, Park. 113, 121.

³ Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the "*contrairiositie*" of the supposal of the two writs. Y. B. 8 H. VI. 27-17; 22 H. VI. 15-26; 14 H. VII. 12-32.

⁴ 1 Nich. Britt. 138. "If the taker or detainer admit the bailiff to view and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not villein of the deforcestor, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." Compare the case of an estray. 1 Nich. Britt. 68. "If the law avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony."

without proof, of ownership. The goods were returned to him as goods wrongfully replevied, and the plaintiff, as before, was driven to his appeal or trespass.¹

The law was so far changed by the judges in 1331, that if the defendant allowed the sheriff to take the goods, he could not afterwards abate the action by a claim of title.²

But it was still possible for the defendant to claim property before the sheriff and so arrest further action by him. To meet this difficulty, the writ *de proprietate probanda* was devised, probably in the reign of Edward III. By this writ the sheriff was directed to replevy the goods, notwithstanding the defendant's claim, if by an inquest of office the property was found in the plaintiff's favor. This finding for the plaintiff had no further effect than to justify the sheriff in replevying the goods, and thus to permit the plaintiff to go on with the replevin action, just as he would have done had the defendant allowed the sheriff to take the goods.³ Replevin thus became theoretically concurrent with trespass.⁴ A disseisor could not thereafter gain the absolute property by his tort. A writ in trespass for carrying off and killing the plaintiff's horse was no longer assailable for repugnancy. In 1440, to a count

¹ Y. B. 21 & 22 Ed. I. 106; Y. B. 32 & 33 Ed. I. 54. If the defendant, instead of claiming title in himself, alleged title in a third person, he could only defeat the action by proof of the fact alleged. Y. B. 32 Ed. I. 82; Y. B. 34 Ed. I. 148.

² Y. B. 5 Ed. III. 3-11. The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. See also Y. B. 21 Ed. IV. 64 a-35, and Y. B. 26 H. VIII. 6-27. There is an echo of the old law in Y. B. 7 H. IV. 28 b-5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary — *credo quod non est lex.*"

³ Y. B. 1 Ed. IV. 9-18.

⁴ Y. B. 7 H. IV. 28 b-5, *per* Gascoigne, C. J.; Y. B. 19 H. VI. 65-5, *per* Newton, C. J.; Y. B. 2 Ed. IV. 16-8, *per* Danby, C. J.; Y. B. 6 H. VII. 7-4, *per* Brian, C. J., and Vavasor, J.; Y. B. 14 H. VII. 12-22. In fact, there are no reported cases of replevin for trespass from the time of Edward III. to the present century. See *Mellor v. Leather*, 1 E. & B. 619. Almost at the same time that the scope of replevin was enlarged, there was a similar duplication of remedies against the disseisor of land. Originally, if we except the writ of right, the assize of novel disseisin (or writ of entry in the nature of assize), which was the counterpart of trespass *de bonis asportatis*, was the exclusive remedy against a disseisor. Trespass *quare clausum fregit* was confined to cases of entry not amounting to an ouster. If, therefore, the defendant in a writ of trespass claimed the freehold, the writ was abated. The plaintiff must proceed against him as a disseisor by the assize. 2 Br. Note Book, 378; Ab. Pl. 142, col. 1, rot. 9 [1253]; Ab. Pl. 262, col. 1, rot. 18 [1272]. About 1340, trespass *quare clausum* was allowed for a disseisin. Y. B. 11 & 12 Ed. III. 503-505, 517-519; Y. B. 14 Ed. III. 231.

in trespass for taking a horse, the defendant pleaded that he took it *damage feasant* to his grain, which the plaintiff had carried off. It was objected that the plea was bad, as showing on its face that the grain was the plaintiff's by the taking. But the court allowed the plea on the ground that the defendant might have brought a replevin for the grain which proved the property in him at his election.¹ It became a familiar notion that the dispossessed owner might affirm the property in himself by bringing replevin, or disaffirm it by suing in trespass.² In other words, there was a disseisin by election in personalty as well as in realty.

The disseisee's right *in rem*, however, was still a qualified right; for replevin was never allowed in England against a vendee or bailee of a trespasser, nor against a second trespasser.³ It was only by the later extension of the action of detinue that a disseisee finally acquired a perfect right *in rem*. Detinue, although its object was the recovery of a specific chattel, was originally an action *ex contractu*. It was allowed only against a bailee or against a vendor, who after the sale and before delivery was in much the same position as a bailee. So essential was the element of privity at first, that in England, as upon the Continent, during the life of a bailee, he only was liable in detinue even though the chattel, either with or without the bailee's consent, were in the possession of a third person.⁴ In counting against a possessor after the bailee's death, the bailor must connect the defendant's possession with that of the bailee, as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him.⁵ Afterwards, a bailor was permitted to charge a sub-bailee in detinue in the lifetime of the bailee.⁶ This action seems to have been given to a loser as early as the reign of Edward III.⁷ But it was a long time before the averment of the plaintiff's loss of his goods became a fiction. As late as

¹ Y. B. 19 H. VI. 65-5.

² Br. Ab. Replev. 39; Y. B. 6 H. VII. 8 b-4; Y. B. 14 H. VII. 12-22; Russell v. Pratt, 4 Leon. 44-46; Bishop v. Montague, Cro. Eliz. 824; Bagshaw v. Gaward, Yelv. 96; Coldwell's Case, Clayt. 122, pl. 215; Power v. Marshall, 1 Sid. 172; 1 Roper, H. & W. (Jacob's ed.) 169.

³ Mennie v. Blake, 6 E. & B. 847.

⁴ Y. B. 24 Ed. III. 41 a-22; Y. B. 43 Ed. III. 29-11.

⁵ Y. B. 16 Ed. II. 490. But see Y. B. 9 H. V. 14-22.

⁶ Y. B. 11 H. IV. 46 b-20; Y. B. 10 H. VII. 7-14.

⁷ Y. B. 2 Ed. III. 2-5.

political case except that the upholding of his party was a duty attaching to his position. Over the five weak men who sat beside him, this coarse and dexterous ruffian predominated as he chose." He used to say to the faltering accusers, "Bring me prisoners and I'll find you law,"—words that Jeffreys might have spoken, but not a judge. "Except Civil and Scotch Laws and probably two or three works of indecency, it may be doubted if he ever read a book in his life." He publicly thanked the jury for finding Muir guilty of sedition. "If there had been nothing but his own reason or conscience to restrain him, it is not easy to see what Braxfield would not have done." "His blamableness in these trials far exceeds that of his brethren. They were weak; he was strong. They were frightened; he was not. They followed; he, the head of the court, led." Not only that, but the port sometimes got a little the better of the judges toward the end of a long hearing. "Not that the ermine was absolutely intoxicated; but it was certainly very muzzy. The strong-headed ones stood it tolerably well." It must be added, in justice to the Lord Justice Clerk, that "Bacchus had never an easy victory over Braxfield."

So, after all, it is not strange that Braxfield has failed to become an important character in Scottish history in spite of his excellent opportunities. The miscarriage of justice that sent Muir and Gerrald to Botany Bay is infamy enough for one man. Nor has Braxfield's law stood the test of time any better than the verdict of his juries. "About thirty-five years after the trial [Muir's], I asked one of the jurymen how, on looking back, he could account to himself for his conduct. His answer was, '*We were all mad.*' A poor apology for a jury; none whatever for a court."

MANY readers of "The Hundredth Man" must have thought Mr. J. Weatherby Stull's Law Hospital a very fanciful notion, and yet the "American Law Review" describes as existing at Copenhagen a kind of law dispensary, where legal assistance is gratuitously furnished to poor and needy law patients. Two similar institutions are said to exist in America,—one in New York and one in St. Louis. But the best of it is, that the truth is better than the fiction; for while Mr. Stockton's creation is a hospital founded and endowed as the last act of selfishness, the hospital at Copenhagen is a true charity, supported by young lawyers, who thus give their services to the poor for nothing. There is certainly no reason in the nature of things why lawyers should not be as charitable with their learning and skill as doctors—and perhaps they are; but at best their unselfishness is sadly unorganized.

IN 1778 Bathsheba Spooner, together with three men, was tried, convicted, and hanged for the murder of her husband.¹ No case in Massachusetts ever attracted greater attention in its day. At this time, when many of the feelings that once gave the case living interest are gone forever, the tale of the "Spooner Murder" is still often told with high local coloring and real feeling. The Parkman murder was not a more celebrated case. And it is no wonder. All elements of interest united to make a tale of romance from beginning to end,—politics, religion, love, infidelity, war, misfortune, and crime are mixed

¹ 2 Chandler's Criminal Trials, pp. 1-58.

into the tale. But it was left to the law to add a dark epilogue which turned romance into fearful reality.

It was only a few months after Burgoyne's surrender that a young American officer caught the attention of Mrs. Spooner, won her love and confidence. He was one of those that were hanged at Worcester. Hon. Timothy Ruggles, of Hardwick, was the father of Mrs. Spooner. He was a large landowner, a real lord of the manor, who kept extensive game parks and a stable of thirty or more saddle-horses; a lawyer, judge, politician, soldier, president of the First Continental Congress, and already, in 1778, an emigrated Tory. Hence the strong political feeling against Mrs. Spooner. After their conviction, the three men concerned in the murder "became mighty in the Scriptures, and were wont to make very pertinent remarks upon many passages that were mentioned to them." Days of fasting and prayer were observed in the effort to ward off the dire effects of such monstrous crimes from the community. Good Dr. Fiske, of Brookfield, preached a most feeling discourse on the day of the interment of Mr. Spooner.

But there is a point of great legal interest connected with the trial. While under sentence of hanging, Mrs. Spooner petitioned the governor and council for a respite on account of her pregnancy. The council issued to the sheriff a writ *de ventre inspiciendo*, ordering him to summon a jury of "two men midwives and twelve discreet and lawful matrons" to ascertain the truth of her plea. "The verdict of the above matrons is, that the said Bathsheba Spooner is not quick with child." Accordingly Mrs. Spooner was executed. But a post-mortem examination proved that her assertion had been true.

In Massachusetts there has been found no subsequent case in which a jury of matrons has been summoned, although there seems to be no evidence that such a jury is not still a part of the machinery of the courts of the State. It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner's case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had. It is not strange that the "Albany Law Journal" jeers at the Pennsylvania papers for suggesting that such a jury be summoned; "it is antiquated," is the taunt. It is possible, even, by an examination of the later cases, to discover a tendency to put questions of alleged pregnancy to doctors for decision. The writ in Mrs. Spooner's case, for example, added two "men midwives" to the twelve matrons,—a departure from common-law practice not entirely happy, however, if we judge by the result. The jury of women in Anne Wycherley's case¹ asked for and got the assistance of a surgeon. In New York the request for a jury of matrons was refused; but the circumstances of the case warranted the refusal without any reflection on the merit of the jury itself.² In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors.

¹ 8 C. & P. 262.

² 39 Albany Law Journal, p. 161.

THE LAW SCHOOL.

LECTURE NOTES.

THE RIGHTS OF SUCCESSIVE ASSIGNEES OF CHOSSES IN ACTION.—(*From Professor Ames' Lectures on Trusts.*)—*Dearle v. Hall*.¹—One Brown was entitled to a yearly sum of ninety-three pounds, being his interest in a certain trust fund. He assigned this interest to the plaintiffs for value, but they gave no notice of the assignment to the trustees. Subsequently, Brown advertised his interest for sale, and the defendants, after inquiring of the trustees concerning Brown's title, and hearing of no encumbrances, purchased the interest. The court held that the plaintiffs could not enforce their claim to the property against the defendant, because they had given the trustees no notice of the assignment, and so had enabled Brown to commit this fraud. By later decisions,² a second assignee gains priority by the mere fact that he anticipates the first assignee in giving notice to the trustee, although he purchased without making any inquiries of the latter.

The court seem to have introduced a registry law, and without sufficient justification. If such a law is expedient, it should come from the Legislature, and the courts seem to recognize the anomalous character of the doctrine by applying it only to personal property.

Notice given to a trustee before he becomes a trustee counts for nothing.³ But notice need not come directly from the assignee. Information obtained from a third person by a trustee, or, in the case of a chose in action, by the debtor, if of a character to influence a reasonable man, is sufficient.⁴ If the assignor is himself one of the trustees, his knowledge of the assignment is not the knowledge of his co-trustee, and hence is not notice.⁵ The principle of the rule requiring notice is to protect persons proposing to advance money, against prior undisclosed assignments. Now, if the assignor, who is also trustee, conceals the fact of the assignment, a subsequent assignee could not, by any reasonable inquiries, learn of it, and so the object of the rule would be defeated. On the same principle the knowledge of an assignee who is a trustee is the knowledge of his co-trustee.⁶ If both assignees are volunteers,⁷ or if notice is given simultaneously⁸ by successive assignees for value, the first assignee prevails.

The English doctrine is not generally followed in this country. But the second assignee is entitled to priority under certain circumstances even in jurisdictions where the registry rule does not obtain. Thus, suppose that an obligee of a legal chose in action assigns it for value first to A, then to B. A gives no notice of the assignment to the obligor, and B collects the money. The right which each assignee obtains is a power. The one who first exercises the power, and reduces the chose

¹ 3 Russ. 48; Ames on Trusts, 423.

² Ames, Cas. on Trusts, p. 427, n. 1.

³ *Butler v. Plunkett*, 1 Johns. & Hem. 441; *Somerset v. Cox*, 33 Beav. 634.

⁴ *Lloyd v. Banks*, 3 Ch. 488, 490; *Ex parte Stewart*, 34 L. J. Bankr. 6.

⁵ *Browne v. Savage*, 4 Drew. 635.

⁶ *Wilkes v. Greenhill*, 29 Beav. 376; *Ex parte Garrard*, 5 Ch. D. 61.

⁷ *Justice v. Wynne*, 12 Ir. Ch. 289.

⁸ *Johnstone v. Cox*, 16 Ch. D. 571; *Ibid.*, 19 Ch. D. 17.

In action to possession, will have the legal right to the money. Here A and B are equally innocent, and hence their equities are equal; but B has obtained the legal title to the money, and is therefore entitled to keep it. The obligee is only liable to A in tort, for an assignor is a grantor, and in no sense a contractor, and he granted to A a power whose value he afterwards wrongfully destroyed.

If B, instead of collecting the money, had obtained a judgment in his own name against the obligor, his right would be paramount to A's;¹ otherwise, if B got judgment in the assignor's name.

B might pursue still a third course, and enter into an agreement with the obligor by which the latter should agree to regard B, and not the original obligee, as his creditor. This agreement extinguishes the old debt. That is, there is a complete novation. The consideration for the obligor's promise to B is the equitable release; or, in other words, B agrees, in consideration of the debtor's promise to pay the debt to him, to relinquish all claims on the old debt. Since B has a power to sue for the debt, he has a right to make this promise; and therefore if A sues the obligor, thereafter, the latter has a perfect equitable defence; viz., the equitable release.²

FIXTURES. — PRIORITY BETWEEN CHATTEL AND REAL-ESTATE MORTGAGEES. — *From Professor Gray's Lectures.* — Where machinery, on which there is a mortgage already existing, is affixed to the realty and then mortgaged as real estate, a question arises as to the rights of the successive mortgagees. For example: A makes machinery and sells it to B, taking a mortgage for the price; B places the machines in his factory, and mortgages his estate for its full value to C. Who is to be protected? C's mortgage is subsequent to A's, it is true; but A, on the other hand, who knew when he sold the machinery that it was likely to become real estate, and so had some reason to anticipate the actual result, had a better opportunity to protect himself. Suppose, again, that C's mortgage existed before the machinery was placed in the factory, but he sets up a claim to the added value, on the general principle that a mortgagee has a right to all additional security. What are the rights of A and C under these circumstances?

In Massachusetts³ it has been held that the real-estate mortgagee has a prior claim in both cases, whether the machinery was added to the land before or after the date of his mortgage. The New York courts⁴ have taken just the opposite view. Neither of these positions is entirely satisfactory. The better rule would seem to be that laid down in Vermont.⁵ So far as the real estate mortgagee has made advances on the faith of property which he finds in the form of real estate, his claim is superior to that of the chattel mortgagee. But where the property has been improved since his mortgage, and he has in no way changed his position on the faith of the improvements, he cannot stand higher than the mortgagor, who holds the machinery subject to the chattel mortgage.

¹ *Judson v. Corcoran*, 17 How. 612; *Ins. Co. v. Corcoran*, 1 Gray, 75.

² *N. Y. & N. H. R. R. Co. v. Schuyler et al.*, 34 N. Y. 30, 80; *Strange v. H. & T. C. R. R. Co.*, 53 Tex. 162.

³ See references in note on *Binkley v. Forkner*, 19 N. E. Rep. 753; 3 HARV. L. REV. 51. — [Ed.]

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ASSAULT — DANGEROUS WEAPON.—To constitute an assault with a dangerous weapon, there must be an intentional attempt by violence to do injury to the person of another, and such an attempt must be coupled with the present ability to do such injury. Therefore, pointing an *unloaded* gun at another, whereby he is put in fear, is not an assault with a dangerous weapon. *State v. Godfrey*, 20 Pac. Rep. 625 (Ore.).

BANKS AND BANKING — COLLECTIONS.—Where a bank receives a check for collection, it must return either the check or the money. Therefore, if the collecting bank surrenders the check to the drawee bank, and accepts in payment a cashier's check, which is afterwards dishonored, the collecting bank is liable to the depositor for the amount of his check. The bank has no right, unless specially authorized, to accept anything in lieu of money. *Fifth Nat. Bank v. Ashworth*, 16 Atl. Rep. 596 (Pa.).

BANKS AND BANKING — NEGLIGENCE — LIABILITY OF DIRECTORS.—The president of a bank misappropriated the funds; money was loaned on little or no security, and to irresponsible persons. Directors, though required to meet weekly, only met two or three times a year, and never caused the books to be examined, or called for statement of accounts with other banks. The bank on suspension was able to pay but 10 per cent. on the deposits. *Held*, that though directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors. *Marshall v. Savings Bank*, 8 So. E. Rep. 586 (Va.).

BILLS AND NOTES — DOMICILED NOTES — RIGHTS AND DUTIES OF BANKS AT WHICH THEY ARE MADE PAYABLE.—A note executed by plaintiff, and made "payable at" defendant bank, was, on maturity, presented by the holder and paid by defendant bank out of funds then on deposit to the credit of plaintiff. The bank had no express instructions from plaintiff to pay the note, and evidence as to a custom, from which it was attempted to show an implied authority so to pay, was conflicting. In an action by the maker of the note to recover from the bank the amount of the deposit thus applied, *held*, that such a note is not equivalent to a check, and that, in the absence of a binding custom, the maker does not, by merely designating on the note a bank as the place of payment and keeping a deposit there, confer any power or authority, or impose any duty upon the bank in reference to the note; such designation being nothing more than a convenience for fixing with certainty the conditional liability of indorsers. *Grissom v. Commercial Nat. Bank*, 10 S. W. Rep. 774 (Tenn.).

In this case the important question as to the difference between a promissory note domiciled at a bank and a check has been for the first time passed upon by the Supreme Court of Tennessee. The decision is in accord with the law of Massachusetts, Illinois, Indiana, Missouri, and Louisiana; while the courts of Iowa (*quære*) and New York follow the English rule, though only to the extent of holding that such a note confers upon the bank to which it is presented by the lawful holder authority to apply, at its option, deposits of the maker toward payment, or even to advance the amount and charge the same as a loan to the maker. As to English rule, see *Rolin v. Steward*, 14 C. B. 595; *Roberts v. Tucker*, 16 C. B. 560. For a full discussion of the authorities see the opinion of Folkes, J., in the principal case.

COMMON CARRIERS — REASONABLENESS OF REGULATIONS — EXEMPLARY DAMAGES.—A railroad company refused to deliver baggage at one of its stations where it was most convenient for its passengers to connect with another line, but allowed passengers to take and leave its trains there. *Held*, the regulation is unreasonable and void; and if the jury think it was adopted wilfully,

or with such negligence as indicates a wanton disregard of the rights of others, they may give exemplary damages. *Pittsburgh, C., & St. L. Ry. Co. v. Lyon*, 16 Atl. Rep. 607 (Pa.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PHYSICIAN'S LICENSE. — A State statute which requires every physician to procure a certificate from the State Board of Health that he is a graduate of a reputable medical school, or has practised in the State ten years, or had passed a satisfactory examination as to his qualifications, and which makes the practice of medicine without such certificate a misdemeanor, is a constitutional regulation, and does not deprive a physician who has practised in the State for six years before the passage of the act, of his liberty or property without due process of law. There is no such "vested right" or "estate" in a profession that the State cannot at any time impose upon its exercise such reasonable and appropriate qualifications as are demanded by the public welfare. *Dent v. West Virginia*, 9 Sup. Ct. Rep. 231.

The court distinguish *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, ib. 333, as being cases in which the alleged qualifications were, in reality, penalties imposed for past acts, and not reasonable qualifications imposed upon the exercise of professional callings. These decisions, it is said, merely decide that preachers and lawyers "cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct respecting matters which have no connection with such profession."

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — PRIVILEGES AND IMMUNITIES. — Sect. 4059, Iowa Code, provides that "if any person now or hereafter has in his possession in this State any such Texas cattle, he shall be liable for any damage that may accrue from allowing said cattle to run at large, and thereby spreading the disease known as the 'Texas Fever.'" *Held*, that this statute is constitutional. It is not in conflict with sect. 8, art. 1, Constitution of United States, as an attempt to regulate interstate commerce; nor with sect. 2, art. 4, relative to privileges and immunities of the citizens of the several States. *Kim-mish v. Ball*, 9 Sup. Ct. Rep. 277.

CONSTITUTIONAL LAW — PENAL CLAIMS IN ONE STATE — ENFORCEMENT IN ANOTHER STATE — REDUCTION INTO JUDGMENT. A New York statute (Act of 1875, ch. 611) provides that if an officer of a corporation makes a false report, etc., he shall be liable for all the corporation debts, etc. *Held*, that H, who had obtained a judgment against A in New York under the above statute, could bring no action on that judgment in Maryland. No State will enforce the penal laws of another State; the reduction of a penal claim into judgment does not change the nature of the claim.

The dissenting opinion is based on the theory that the word "penal" is used in two senses: (1) With reference to those breaches of duty which confer upon individuals the right to recover, at their option, from the offender a determinate sum; (2) breaches of duty which are strictly crimes, and of which the State alone can take cognizance. Only the latter class properly come within the rule that no State will enforce the penal laws of another State. *Attrill v. Huntington*, 16 Atl. Rep. 651 (Md.).

The decision itself is supported by the weight of authority; but there seems to have been a tendency in some recent cases toward the view expressed in the minority opinion. See *Engine Co. v. Hubbard*, 101 U. S. 452; *Chase v. Curtis*, 113 U. S.

CONSTITUTIONAL LAW — POLICE POWER — NUISANCE — FENCES. — St. Mass. 1887, c. 348, provides that any fence unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance. Construing the act to mean that the motive must be actual malevolence, without which the fence would not have been erected or maintained, the court held it a constitutional exercise of the police power. While the legislature could not under the police power prohibit putting up or maintaining stores or houses with malicious intent, yet a small limitation of existing rights incident to property is permissible. And even with regard to fences already built at the passage of the act, considering the smallness of the injury, and the nature of the evil to be avoided, and the fact that police regulations may limit the use of property in ways which greatly diminish

its value (*Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1), the act cannot be deemed unconstitutional. *Rideout v. Knox*, 19 N. E. Rep. 390 (Mass.).

EQUITY — JURISDICTION — BILL OF REVIVOR. — A bill for discovery, an account, and an injunction, against an infringer of a patent, may be revived against his executor as to the account, although the right to the injunction — the principal relief sought — is gone. *Hohorst v. Howard*, 37 Fed. Rep. 97 (N. Y.).

FACTORS AND BROKERS — WRONGFUL SALES — MEASURE OF DAMAGES. — The measure of damages in an action against a broker for selling his principal's stocks in violation of his orders is the highest intermediate value reached by the stocks between the time of sale and a reasonable time after the owner has received notice of it to enable him to replace the stocks. *Galigher v. Jones*, 9 Sup. Ct. Rep. 335. The Supreme Court here adopts the New York rule as to measure of damages as laid down in *Wright v. Bank*, 110 N. Y. 237, digested in 2 HARV. L. REV. 188.

HIGHWAYS — OBSTRUCTION BY ORDER OF COURT. — By order of the judge of a State court, a rope was stretched across a highway in a city, to prevent disturbance of the court by travel over said highway. Plaintiff drove against the rope and was injured thereby. *Held*, plaintiff has no cause of action against the city. *Belvin v. City of Richmond*, 8 S. E. Rep. 378 (Va.).

INSURANCE — RIGHT TO SUBROGATION. — Where the loss is caused by the negligence of a third person, the insurance company cannot, before indemnifying the insured, compel him to assign to it his right of action against the tort-feasor. No right to subrogation arises until the company has satisfied the loss. *Ins. Co. v. Fidelity Title and Trust Co.* 16 Atl. Rep. 791 (Pa.).

NEGLIGENCE — DANGEROUS SUBSTANCES. — If the owner of a lot abutting on a public street in a city erects a building on it with a roof so constructed that ice and snow collecting on it will naturally and probably fall on the adjoining sidewalk below, he is liable, without other proof of negligence, to a person injured by the falling ice or snow, while travelling on the sidewalk with due care. It is no defence that he exercised all the diligence and care he could to remove the snow and ice from the roof. The gist of the negligence in such case consists not in the management of the roof, but in the improper and unsafe construction. *Hannem v. Pence*, 41 N. W. Rep. 657 (Minn.).

For a case almost exactly similar, see *Shipley v. Fifty Associates*, 101 Mass. 251, 106 Mass. 194. These cases come under the peculiar principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330. The defendant in such a case can free himself from liability by showing that the escape of the dangerous substance was occasioned by the plaintiff's own default or by *vis major*. See *Box v. Jubb*, 4 Ex. D. 76, and *Carstairs v. Taylor*, 6 Ex. 217.

PATENTS FOR INVENTIONS — INFRINGEMENT — INJUNCTION BEFORE ISSUE OF PATENT. — Bill in equity to enjoin the use of an invention for which the plaintiffs had not obtained a patent. They had filed an application for a patent which was still pending in the patent office when this bill was filed. *Held*, a court of equity has no jurisdiction to enjoin the infringement of an invention before a patent has been issued, notwithstanding an application for the same has been made and is still pending in the patent office. In *Builer v. Bull*, 28 Fed. Rep. 754, which is the only case in which this point has before been directly decided, the injunction was allowed, but the question was not discussed upon principle, and the authorities cited do not support the decision of the court. That case must, therefore, be considered as erroneous in principle; for at common law there was no special property in an invention. The right of property which the inventor has in his invention is derived altogether from statute, and is created by the patent; and the power of the court to deal with patents is regulated by § 4921 of the Rev. Stats., which gives protection only to such rights as are "secured by patent." *Rein et al. v. Clayton et al.*, 37 Fed. Rep. 354 (Mich.).

PROPERTY — RIGHTS OF OWNER — PRIVATE PROPERTY AFFECTED WITH A PUBLIC INTEREST. — On a bill to restrain the defendants from depriving the plaintiff of the Board of Trade quotations, *held*, that although the Chicago

Board of Trade is a private corporation, and the business transacted by it daily is of a private nature, yet, it having for many years permitted and invited a telegraph company to transmit during the sessions of the Board, to all persons who chose to pay for the information, reports of the dealings of the Board, fluctuations in prices, etc., and the information so obtained having, in consequence, become of essential importance to the commercial world, such a system of publishing information has become affected with a public interest, and the Board cannot now treat its information as purely private, and withhold it from the public. *New York & C. Grain and Stock Exch. v. Chicago Board of Trade*, 19 N. E. Rep. 855 (Ill.). This case is an interesting illustration and extension of the doctrine laid down in *Munn v. Illinois*, 94 U. S. 113. It differs from that case in that here no statutory question is involved.

REAL PROPERTY—FIXTURES—RIGHTS OF REAL AND CHATTEL MORTGAGEES.—Machinery upon which there was a chattel mortgage for the purchase price was annexed to the realty, but in such a way that the realty would not be injured by its removal. There was a prior mortgage upon the land, also a subsequent mortgage upon the land and machinery, which described the latter as personalty. *Held*, that the machinery would be regarded as personalty, as against the subsequent mortgagee, for he had notice; and as against the prior mortgagee, for his original security would thereby be in no degree diminished. *Binkley v. Forkner*, 19 N. E. Rep. 753 (Ind.).

Upon the disputed question as to the rights of real and chattel mortgagees to fixtures attached to the realty under an agreement that they shall remain personalty until paid for, this case represents the better view as to both classes of mortgagees. In accordance with this case, see as to rights of a prior mortgagee of the realty, *Tiffi v. Horton*, 53 N. Y. 377; as to the rights of the subsequent mortgagee, *Davenport v. Shunts*, 43 Vt. 546, and *Stillman v. Flenniken*, 58 Ia. 450.

But see *contra*, as to rights of prior mortgagee, *Hunt v. Bay State Iron Co.*, 97 Mass. 279, and *Porter v. Steel Co.*, 122 U. S. 267.

REAL PROPERTY—RULE AGAINST PERPETUITIES.—Bequest to the mayor of the city, and the presidents of two medical colleges and their successors, in trust forever, for the purpose of founding a public library. *Held*, that as the intention was to vest the property in the persons who might from time to time occupy the official positions mentioned forever, and not in the corporations of which they were the heads, the bequest was void by the rule against perpetuities. *Cottman v. Grace et al.*, 19 N. E. Rep. 839 (N. Y.).

TELEGRAPH COMPANIES—LIABILITY FOR DELAY OF TELEGRAM.—A telegraph company fails to deliver promptly a message whereby the plaintiff loses an opportunity of buying land which rapidly rises in value. *Held*, that the company was liable, the damage not being too remote or contingent. *Alexander et al. v. Western Union Tel. Co.*, 5 So. Rep. 397 (Miss.).

For other cases on the liability of a telegraph company to the receiver of a telegram for a delay in its delivery, see *Wadsworth v. Tel. Co.*, 86 Tenn. 695, digested in 2 HARV. L. REV. 146.

WILLS—CONSTRUCTION—CHARGING LEGACIES ON RESIDUARY ESTATE.—In the absence of extrinsic circumstances indicating a different intention, when a will gives general legacies followed by the usual residuary clause disposing of the whole of the testator's real and personal property, the general legacies are not charged upon the land included in the residuary devise. *Brill v. Wright et al.*, 19 N. E. Rep. 628 (N. Y.).

For the contrary rule see *Wilcox v. Wilcox*, 13 All. 252; *Lewis v. Darling*, 16 How. 1; and *Greville v. Brown*, 7 H. L. Cas. 688. But see the opinion of Lord Wensleydale in the last case, in which he seemed disposed to agree with the rule adopted in the above case.

REVIEWS.

SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY. By John Chipman Gray. Vol. II. Cambridge: Charles W. Sever, 1889.

With the second volume, the plan which Professor Gray has followed in making this selection of cases becomes more apparent. In the catalogue of the Harvard Law School he has described his course as one on "Real Property;" but in naming his book he has dropped the adjective. An examination of these volumes makes his reasons clear, because he begins with some 300 pages devoted to personal property, the nature and acquisition of rights therein. He then turns to the subject of real property, and after an historical survey, of the feudal tenures, he finishes the first volume with cases on the nature and incidents of ownership in real property. Having treated of the rights of an owner in his own land, he devotes the second volume entirely to rights in the land of others. It is to be hoped that other volumes will follow, until Professor Gray has presented the whole subject of property as he teaches it. To those who have had the benefit of the "invisible treatise"—to quote Mr. James Schouler in the last number of the "American Law Review"—of Professor Gray's lectures, these books will save many a weary and unsuccessful hunt for authorities in ill-managed or defective libraries.

E. V. A.

A TREATISE ON THE LAW OF AGENCY. By Floyd R. Mechem. Callaghan & Co., Chicago, 1887. 8vo.

No branch of the law of equal importance has received so little attention from text writers as the law of agency; and in supplying a long-felt want in the profession, Mr. Mechem has given us a work of decided merit. The book is not constructed on the ordinary plans of recent text-books,—an incomplete digest, and badly arranged at that; but the author has very carefully classified the different branches of the law under discussion, and divided and subdivided the topics in a most admirable manner; in fact, one is almost led to believe that the law can be reduced to an exact science after reading Mr. Mechem's simple though exhaustive classification of the law of agency. The author's style is clear and terse, and though limited in space to one volume, he always gives a complete list of late cases, especially those decided in America. A special chapter on the legal relation of attorney and client adds to the value of the work,—it gives a clear exposition of what an attorney can do in virtue of his employment without the express consent of the client.

The arrangement of the book and the index are both excellent; the profession is to be congratulated in being able to lay aside the obsolete works of Story and Dr. Wharton, and in having their places supplied with a modern book adapted to the exigencies of the hour.

C. M. L.

HARVARD LAW REVIEW.

VOL. III.

MAY 15, 1889.

No. 2.

LEGAL RIGHTS UNDER THE CLAYTON-BULWER TREATY.

SOON after the establishment of the independence of the Spanish-American republics, the United States, as well as several European States, were occupied with schemes for constructing a ship canal across the isthmus which connects the continents of North and South America. Among other documents of this period bearing on the subject, we may mention, as instructive, a resolution of the Senate, adopted in 1835, requesting the President to enter into negotiations with the governments of other nations, and especially with those of Central America and New Granada, with the view of securing the free navigation of any canal that might be constructed across this isthmus. In concluding a new treaty with New Granada, on the 12th of December, 1846, the United States government succeeded in introducing an article (the thirty-fifth) giving effect to this resolution of the Senate.

By this article the government of New Granada (since 1862, the United States of Colombia) guaranteed "to the government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the government and citizens of the United States," etc. And the "United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality

of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists ; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

"The present treaty shall remain in full force and vigor for the term of twenty years from the day of the exchange of the ratifications." . . . But, "notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of, or all, the articles of this treaty twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform."

The acquisition of California by the United States, in 1848, and the subsequent discovery of gold in that territory, gave an increased interest to the projects for cutting the Central-American isthmus, and thus shortening the water route to our western coast. In this same year, Aspinwall, Stephens, & Co. obtained from the government of New Granada the concession of the right of way for a railway across the Isthmus of Panama. The next year, 1849, Vanderbilt and others formed at New York a company called "the American, Atlantic, and Pacific Company," to whom the government of Nicaragua granted the right to construct a ship canal across the territory of that State.

At about the same time—June, 1849—Mr. Hise, the diplomatic agent of the United States in Central America, concluded a treaty with Nicaragua, but without instructions from his government, by which the United States were to exercise exclusive dominion over any route through the territory of that State. This treaty was never ratified by the United States, but it had some influence upon the negotiations with England which were entered upon subsequently.

At this time the Nicaragua route was thought to be the most feasible one for a ship canal, for the reason that Lake Nicaragua and the San Juan river might, it was believed, be made use of for a part of the way. But an obstacle to the free use of this route now presented itself, in the fact that the mouth of the San Juan river, and hence the eastern terminus of the proposed canal, was

under the dominion of England. She had recently taken possession of the small town of San Juan del Norte, situated at the entrance to the above-named river, and had changed its name to Greytown, raising over it what was declared to be the Mosquito flag. The alleged ground of this action was, that this place was a part of the territory of the Mosquito Indians, over whom England had, it was asserted, exercised a protectorate for two hundred years. The so-called Mosquito coast extended indefinitely several hundred miles along the coasts of the republics of Honduras and Nicaragua. England had, moreover, a settlement on the main-land, farther to the north, called British Honduras, or Belize; she also laid claim to the Bay Islands, situated in the Bay of Honduras, as dependencies of Belize.

The government of the United States, alarmed at this preponderance of British influence in Central America, cast about for the means of counteracting it. To oust England from her strong position by force was felt to be much too grave an undertaking, even were the United States disposed to attempt it. But the American statesmen of that day were, as a rule, only intent on securing a free transit across the isthmus not under the exclusive control of any European nation. They resolved, therefore, upon a peaceful and conciliatory policy: if England could not be got rid of, yet she might consent to act in conjunction with the United States in guaranteeing the proposed isthmus transit. Accordingly, the English government was invited, through Mr. Abbott Lawrence, American Minister in London, to join the United States in the protectorate of the Panama route, as set forth in the thirty-fifth article of the treaty of 1846 with New Granada; and also to enter into a treaty with Nicaragua similar to that negotiated by Mr. Hise, which was then in the hands of the President. The condition attached to this proposal was, however, that the Mosquito protectorate should be withdrawn by England. In the event of this proposal not being accepted, it was further intimated, probably as a mild threat, that the Hise treaty would be submitted to the Senate for its approbation. The subsequent negotiations in regard to this question were transferred to Washington, and carried on by Mr. Clayton, Secretary of State, and Sir Henry Lytton-Bulwer, the English Minister at Washington. The result was a direct treaty between the two parties, signed April 19, 1850, and since known as the Clayton-Bulwer treaty.

By the first article of this treaty the two governments agree that "neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal (by the Nicaraguan route); agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same." And, further, neither will seek to obtain any advantage not freely accorded to the other.

By Article II. it is agreed that, in the event of war between the contracting parties, vessels traversing the canal shall be exempt from blockade or capture by either belligerent; and this provision shall extend to a distance, from either end of the canal, which may be hereafter found expedient.

By Article V. the two governments engage to guarantee the neutrality and security of the canal, when it shall have been constructed, but either party is at liberty to withdraw from this agreement of protection on giving six months' notice to the other.

Article VI. contains a stipulation that the contracting parties shall "invite every other State with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated." Also that "each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention; namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all, and of protecting the same."

Article VII. gives priority of claim to protection to any such persons or company "as may first offer to commence the same, with the necessary capital," etc.

By Article VIII. "the governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama."

At the time of the execution of this treaty England claimed, as we have seen, dominion over (1) the Mosquito coast, (2) British Honduras, (3) the Bay Islands. Before the final exchange of ratifications of the treaty, Sir H. L. Bulwer filed a paper at the State Department in Washington declaring that "Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras, or to its dependencies."

Mr. Clayton answered, in a note of July 4, acknowledging that he "understood British Honduras was not embraced in the treaty of the 19th day of April last, but at the same time declining to affirm or deny the British title in their settlement or its alleged dependencies." He says further, "The consent of the Senate was not required, and the treaty was ratified as it stood when it was made."

England then renounced her dominion over Greytown, but continued to exercise a protectorate over the Mosquito Indians; and shortly after the ratification of the treaty, proceeded to erect the Bay Islands into a separate colony. This, the United States contended, was a direct violation of the stipulations of the treaty; and immediately thereupon a controversy arose in regard to the interpretation of the treaty. The British government took the position that the first article of the treaty related only to future acts, and did not embrace places in their possession at the time the treaty was made. This construction was rejected by the United States; they were willing to admit the British construction in the case of the Belize, provided the boundary should be satisfactorily settled; but as to the Mosquito coast and the Bay Islands, such construction would defeat the very object of the treaty.

This controversy lasted for ten years, and at times seemed perilously near precipitating a war between the two States. An

attempt was made to settle it in 1856, by a new treaty, — known as the Clarendon-Dallas treaty, — but this failed of ratification by reason of an amendment introduced by the Senate by which the Bay Islands were given absolutely to the Republic of Honduras.

On the failure of the Clarendon-Dallas treaty, there remained two possible modes of proceeding ; namely, by reference to arbitration, or by the absolute abrogation of the treaty of 1850. In the opinion of the United States, said Mr. Cass, the subject did not admit of reference to arbitration. And as to the abrogation of the Clayton-Bulwer treaty, the United States would consent to this only on condition of making some other settlement of the question. For, in the event of abrogation, England insisted on resuming her former pretensions in Central America. Mr. Clayton said, " The abrogation of the treaty restores the British protectorate with renewed vigor ; and unless immediately after it shall be annulled we shall be prepared to attack her in Central America, she will reassert her title so effectually that in one year the whole isthmus will be under her influence."¹ In the meantime England sent out, in 1857, a commissioner — Sir William Gore Aulseley — to negotiate treaties with the Central American States, which should be in accordance with the Clayton-Bulwer treaty, and perhaps satisfy the American construction of the treaty. Mr. Cass assured the English government that the United States would be satisfied if the proposed treaties should adjust the disputes in regard to the Mosquito protectorate, the Bay Islands, and the boundary of Belize, "in accordance with the general tenor of the American interpretation of the treaty." This plan proved successful. Treaties were concluded (1) with Guatemala in 1859, by which the boundaries of Belize were determined ; (2) with Honduras, in the same year, by which the Bay Islands were given up to that State ; (3) with Nicaragua in 1860 (also by that with Honduras), by which the British protectorate over the Mosquitos was withdrawn.

It will be seen that the principles involved in these treaties coincide almost exactly with the American construction, and with the Senate amendments to the Clarendon-Dallas treaty. England conceded in 1860 what she flatly refused in 1856. The United States thus gained all they had contended for. Mr. Buchanan said in his annual message of December, 1860, " The dis-

¹ Appendix to Cong. Globe, 1855-1856, p. 441.

cordant construction of the Clayton-Bulwer treaty between the two governments have resulted in a final settlement entirely satisfactory to this government." Mr. Buchanan afterwards wrote, that, at the close of "his administration, no European colony existed on the American continent, except such as had been established before the Monroe doctrine was announced, or had been formed out of territory then belonging to a European power." ¹

Thus, in 1860, the Clayton-Bulwer treaty was restored to its full original authority. But the primary object for which it was made—the construction of a canal—still remained unaccomplished. The controversy over the treaty had delayed proceedings by the New York company, till the government of Nicaragua, incensed by the filibustering expeditions of Walker, revoked, in 1855, the concession to the company. The breaking out of the Civil War in 1861 arrested further action in this direction on the part of Americans. The Clayton-Bulwer treaty continued, nevertheless, to be considered as binding the two States. In a despatch to Mr. Adams, in 1866, Mr. Seward said that, "supposing the canal should never be built, it may be a question whether the renunciatory clauses of the treaty are to have perpetual obligations. Technically speaking, this question might be decided in the negative. Still, so long as it should remain a question, it would not comport with good faith for either party to do anything which might be deemed contrary to even the spirit of the treaty."

So, Mr. Fish, in a despatch of April 26, 1872, to Mr. Schenck, in regard to a rumor of British encroachment upon the territory of Guatemala, said, "You will then (if the rumor prove to be true) formally remonstrate against any trespass by British subjects, with the connivance of their government, upon the territory of Guatemala, as an infringement of the Clayton-Bulwer treaty, which will be very unacceptable in this country."

Again, on March 4, 1880, Mr. Evarts, writing to Mr. Logan, then Minister to Central America, in regard to a rumor that England was about to acquire the Bay Islands by purchase, said, "It seems unquestionable that the Clayton-Bulwer treaty precludes the acquisition of those islands by Great Britain."

After the French were forced out of Mexico, in 1866, Mr. Seward would seem to have changed his mind in regard to the

¹ Buchanan's Administration, p. 284.

Clayton-Bulwer treaty. During the period from 1868 till 1870 he attempted, by means of a new treaty with Colombia, to secure for the United States the absolute control of the transit by way of the Isthmus of Panama. But his proposals were rejected by the government of Colombia. Mr. Seward was, doubtless, influenced in his action by the remembrance of the unfriendly attitude of England and France towards the United States during the Civil War. "The United States," he said, "would not permit to a public enemy of the American continent, the use or advantages of a work executed by nations of the New World." On the other hand, Mr. Fish proposed, in 1877, with reference to the Nicaragua route, a joint action of the maritime powers in neutralizing any future canal.

In the meantime Lieutenant Wise had explored the Panama route, and in 1878 the de Lesseps Company was organized in Paris, and obtained from Colombia a grant of a right of way across its territory. The congress which met in Paris in May, 1879, decided upon a sea-level canal on the line of the Panama Railway, and the government of Colombia issued an invitation to the European powers to join in guaranteeing the neutrality of the canal when completed.

The United States were both surprised and alarmed at this turn of affairs, and were impressed with the necessity of asserting their rights in regard to these projects. In both Houses of Congress resolutions were introduced, reaffirming the principles of the Monroe doctrine, and declaring that the United States must exercise such control over any interoceanic canal as their safety and prosperity demanded. The Executive branch of the government also took the matter up. Mr. Evarts protested against the action of Colombia, and proposed to the Colombian Minister, General Santo Domingo Vila, a new treaty, supplementary to that of 1846, by the terms of which "all concessions and privileges granted or to be granted by the United States of Colombia with the view of assuring the construction of an interoceanic canal across the Isthmus of Panama are and shall be subject to the rights acquired by the United States of America by virtue of the guarantee given by them in the thirty-fifth article of the Treaty of 1846," and that no concession should be granted by Colombia without the consent of the United States. And, further, that the United States should be permitted to establish and occupy any fortifica-

tions at the entrance of the canal which should be deemed necessary. General Vila replied, in effect, on the 10th of February, 1881, that to accept the proposals of Mr. Evarts would be a serious blow to the independence of Colombia as a sovereign State, and that he could not accept the idea, even as a simple basis of discussion. A convention, in a modified form, negotiated immediately afterwards by Mr. Trescot and General Vila, was rejected by the Colombian Senate on February 17.

President Hayes had said, in a special message, dated March 8, 1880, "that the policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power. . . . An interoceanic canal across the American isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and Pacific shores, and virtually a part of the *coast line* of the United States." In his inaugural address, President Garfield made use of similar language.

It was left, however, to the successors of Mr. Seward and Mr. Evarts in the State department to sustain by argument the position of the United States in regard to the canal and the Clayton-Bulwer treaty. In a despatch to Mr. J. R. Lowell, dated June 24, 1881, Mr. Blaine calls attention to the treaty of guarantee of 1846 between Colombia and the United States, and says that, "in the judgment of the President, this guarantee, given by the United States of America, does not require reënforcement, or accession, or assent from any other power." No mention is made in this despatch of the Clayton-Bulwer treaty; but in a subsequent despatch to Mr. Lowell, of the 19th of November, 1881, Mr. Blaine discusses that treaty at great length. "This convention," he declares, "was made more than thirty years ago, under exceptional and extraordinary conditions, which have long since ceased to exist, — conditions which, at best, were temporary in their nature, and which can never be reproduced." The remarkable development of the United States since that time, Mr. Blaine believes, has created new duties upon this government, the complete discharge of which requires some essential modification of the Clayton-Bulwer treaty. For although the military power of the United States is without limit, and, in any conflict on the

American continent, altogether irresistible, this treaty commands the government not to use a single regiment of troops to protect its interests in connection with the interoceanic canal, but to surrender the transit to the guardianship and control of the British navy. To counterbalance the preponderance of the British navy, we should be permitted to fortify and control the canal in order to protect our Pacific coast in the event of war. And a comparison is made with England's Indian possessions and the Suez canal. As to a general neutralization of the canal "on paper," Mr. Blaine thinks it would not suffice to preserve its neutrality in time of hostilities. "The first sound of cannon, in a general European war, would, in all probability, annul the treaty of neutrality." The only conclusive mode of preserving the neutrality of the canal is to "place it under the control of that government least likely to be engaged in war, and able, in any and every event, to enforce the guardianship which she shall assume." Besides, we have by right and long-established claim priority on the American continent.

For these reasons Mr. Blaine proposes a modification of the Clayton-Bulwer treaty, so as to permit the United States to fortify the canal, while retaining the prohibition regarding the acquisition of territory in Central America. The eighth article, by which the two governments agree to protect the routes by way of Tehuantepec or Panama, should be considered obsolete; while that looking to the establishment of a free port at either end of the canal, and a neutralized portion of sea, should be allowed to stand.

Mr. Frelinghuysen, who succeeded Mr. Blaine at the State Department in December, 1881, reiterated the arguments of his predecessors as to the necessity of the American control of the canal; and went still farther, in his attempt to prove that the Clayton-Bulwer treaty was null and void by the acts of England, or at least, was voidable, at the pleasure of the United States. The primary object of the treaty, says Mr. Frelinghuysen, was the construction of a canal by the Nicaragua route, and the dispossession of England of her settlements in Central America. But neither of these objects was accomplished; the canal was not made, and England continued to occupy British Honduras. If "Great Britain has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States." Again,

the parties to the treaty "anticipated that a canal by the *Nicaragua route* was to be at once commenced, . . . and finished with all possible speed by American and British capital under the impulse of the joint protectorate." And it is further the opinion of Mr. Frelinghuysen that the agreement had reference to the concession of the State of Nicaragua to the American company organized in 1849, and to no other. He then intimates that the British capital was not forthcoming; and the concession was withdrawn and therefore the treaty became voidable. The sixth article, which contemplated the extension of the agreement to other nations, should be considered as lapsed by reason of the failure to construct the canal to which it referred, and also because no joint protectorate for any canal across the isthmus is required. As to the eighth article, which extends the provisions of the treaty to the Panama and Tehuantepec routes, Mr. Frelinghuysen says our protectorate over Panama, by the treaty with Colombia of 1846, is exclusive in its character, while it exists, which treaty obliges the United States to afford the sole protectorate of any transit across Panama. But, at all events, the fact that England has concurred in the protectorate of the railway on this route by the United States has relieved the last-named government from any obligation to permit her to join in the guarantee.

Mr. Frelinghuysen finds another reason for annulling the Clayton-Bulwer treaty in the fact that in 1850, when the treaty was made, the United States were poor in money; they could not furnish the necessary capital to construct the canal, and were willing, therefore, in order to secure such capital, to surrender some of their exclusive privileges. But now the people of the United States have abundance of surplus capital for such enterprises, and have no need to call upon foreign capitalists.

Finally, the Clayton-Bulwer treaty is said to be in conflict with the Monroe doctrine.

These arguments of Mr. Blaine, Mr. Frelinghuysen, and others, touching the Clayton-Bulwer treaty, we may reduce to three general propositions; namely, first, that the treaty is void or voidable by reason of the failure of England to carry out her part of the agreement; second, that the change of conditions since 1850 has worked a virtual abrogation, or, at least, an essential modification of the treaty; and third, that the treaty is in conflict with the principles of the Monroe doctrine. All these positions were

denied by Lord Granville, English foreign secretary ; and they have been more recently criticised by Mr. T. J. Lawrence, in his volume of *Essays on International Law*.

In regard to the first of the above-mentioned propositions, that the treaty is voidable by reason of the non-performance of certain of its stipulations on the part of England, the first point made by Mr. Frelinghuysen is that England continued, contrary to the stipulations of the treaty, to exercise dominion over British Honduras — in fact, that she changed what was before a mere "*settlement*" into a "*possession*." The declaration of Sir H. L. Bulwer before the final exchange of ratifications, that British Honduras was not to be considered as within the terms of the treaty, and Mr. Clayton's assent to that declaration, does not satisfy Mr. Frelinghuysen ; for this declaration, he avers, was made "after the conclusion of the treaty by the joint action of the President and Senate, and was not made to or accepted by them." This is hardly an accurate statement of the facts, for it would seem that the Senate was not ignorant of the declaration, as the following correspondence will show : —

JULY 4, 1850.

DEAR SIR,—I am this morning writing to Sir H. L. Bulwer, and while about to decline altering the treaty at the time of exchanging ratifications, I wish to leave no room for a charge of duplicity against our government, such as that we now pretend that Central America in the treaty includes British Honduras.

I shall therefore say to him, in effect, that such construction was not in the contemplation of the negotiators or the Senate at the time of the confirmation. May I have your permission to add that the true understanding was explained by you, as Chairman of Foreign Relations, to the Senate, before the vote was taken on the treaty? I think it due to frankness on our part.

Very truly yours,

JOHN M. CLAYTON.

TO HON. W. R. KING, *U. S. Senate*.

JULY 4, 1850.

MY DEAR SIR,—*The Senate perfectly understood that the treaty did not include British Honduras.* Frankness becomes our government, but you should be careful not to use any expression which would seem to recognize the right of England to any portion of Honduras.

Faithfully your obedient servant,

W. R. KING.

TO HON. JOHN M. CLAYTON, *Secretary of State*.

The date of these notes was that on which the ratifications were exchanged, and Sir H. L. Bulwer's declaration was in the hands of

Mr. Clayton on the 29th of June—five days earlier. It can hardly be presumed that the President was ignorant of so important a matter ; indeed, on the 14th of July, President Filmore said, in a communication to Congress, that “the British title to British Honduras stands precisely as it stood before the treaty.” An official exposition of the treaty had appeared on the 8th of July, in the “National Intelligencer,” in which it was said that “the British title to the Belize the treaty does not in any manner recognize ; nor does it deny it, or meddle with it. That settlement remains, in that particular, as it stood previously to the treaty.”¹

We have already seen, in the above historical sketch of the treaty, that the United States accepted this view of its meaning at the time of the final adjustment of the dispute, in 1860. It would seem, therefore, a little late to insist now upon an interpretation of the treaty, which was expressly disavowed by the statesmen who took part in the formation of the treaty, and who insisted so tenaciously upon their construction of it in other respects.

In regard to the other points raised against the validity of the treaty by Mr. Frelinghuysen, his arguments are mainly refuted by the history of the treaty itself. The expectation that “a canal was to be commenced and finished with all possible speed by American and British capital” is not a stipulation of the treaty. That instrument simply states that “it is desirable that no time should be unnecessarily lost in commencing,” etc., but no time is fixed therefor. Again, the provisions of the treaty contemplate the construction of the canal by means of private capital and private enterprise ; there is no agreement, therefore, by either government to furnish capital, but only the protection of that to be invested in the enterprise by individuals.

So, of the statement of Mr. Frelinghuysen, that the agreement had reference to the American company, organized in 1849, the seventh article of the treaty declares that the two governments will give their support and protection to any company which shall have first offered to commence the construction of the canal, and presenting evidence of sufficient capital subscribed to accomplish the undertaking. The reference here is undoubtedly to the above-named American company ; but if, at the end of one year, such company was not prepared to go on with the work, then the contracting parties should be free to “afford their protection to

¹ Seward's Works, 1, 384, 385.

any other persons or company that shall be prepared to commence and proceed with the construction of the said canal."

Now, neither the fact that the canal was not immediately constructed, nor that the American company referred to lost its concession from the State of Nicaragua, would seem to justify the conclusion that the Clayton-Bulwer treaty was thereby annulled, or had become voidable. That treaty contemplated a permanent and far-reaching scheme, with which no temporary interruption should be permitted to interfere. But the strongest argument in favor of the continued validity of the treaty is found in the fact that the government of the United States refused to consent to its abrogation in 1857, and in 1860 expressed its perfect satisfaction with the final settlement of the question, and continued to appeal to the stipulations of the treaty until a very recent date.

The second proposition, mainly relied on by Mr. Blaine, was, that circumstances have so changed since 1850 that the treaty entered into then ought, in justice to the United States, to be considered as modified to correspond with the new conditions. This argument it is more difficult to answer. There is, in the first place, a certain vagueness in the statement; and furthermore, it is at best largely a matter of opinion.

The presumption is, that treaties continue to bind the contracting States; and it is most essential to the interests of international intercourse that a high regard should be paid to the faith of treaties. Yet it is conceivable that circumstances should so change by lapse of time that it would be impossible to carry a treaty into effect, in whole or in part, or that to do so would be unjust and injurious to one of the signatory powers. In the former case, the treaty would become void; in the latter case, it would become voidable, if the change of circumstances were such as to endanger the existence of one of the contracting States. There is a difference of opinion, however, among writers on international law as to this latter point. The writers of continental Europe are, as a rule, inclined to look more leniently upon the breach of treaties than do those of England and the United States. Fiore goes so far as to say that "all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights." The conference of London in 1871 declare, on the other hand, that "it is an essential principle of the law of

nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." If this stricter rule is subject to occasional exceptions in practice, yet it is safer on the whole to proclaim it as the rule than to permit one of the parties—and the interested party—to decide for itself when the occasion has arisen which calls for the abrogation of the treaty. To warrant such action there ought, at least, to be no doubt as to the injurious effect of carrying out the terms of the treaty.

In applying these principles to the Clayton-Bulwer treaty, we are led to inquire, first, whether the conditions under which it was entered into have undergone a change so radical that the complete execution of its provisions at the present time would endanger the political position of the United States or seriously menace their commercial interests. It is contended on the part of the United States that such a change has taken place; the extraordinary development of our possessions on the Pacific Coast was, it is said, unforeseen in 1850. They have become "imperial in extent, and would supply the larger part of the traffic through the proposed canal." The relative importance of a waterway between our eastern and Pacific States has increased in the same ratio; so important, it is said, has such a communication become, that, for purposes of defence and in the interests of our commerce, we must have the exclusive control of it,—and, indeed, consider it as a part of our "coast line." But by the provisions of the Clayton-Bulwer treaty, the isthmus canal would be free to all nations alike; and in the event of war with any European power, in spite of the neutrality of the canal, Mr. Blaine believes that it would be closed to us, and our western coast be exposed to hostile attack, and our commerce interrupted.

To these arguments of Mr. Blaine, Lord Granville answers, that, granting the extraordinary growth of the Pacific States of the United States, the British possessions have developed *pari passu* with those of the United States, and that the canal would be very important for them. But more important still, the canal would have an enormous political interest for all the maritime States of the world. Therefore, the United States have no greater relative interest in the canal than they had when the treaty was made. It is a mistake to suppose that the statesmen of 1850 did not

foresee the rapid development of the Pacific coast ; that was, in fact, one of the motives for negotiating the treaty. Moreover, the development of ways of communication have quite kept pace with that of the Pacific States themselves. Whereas, in 1850, the only practicable routes to California were by way of the isthmus, or around Cape Horn, there are now three lines of railway across the continent, bringing San Francisco within five days of New York — about the estimated time it would take for a ship to go through the Nicaragua canal.

In the event of a hostile attack upon our western coast, troops, and war material of every kind, except ships, would be sent from the East by railway, if haste were called for, rather than by water, even if the canal were unobstructed. But let us suppose that the United States were to exercise the sole protectorate over the isthmian canal, and, for its security, were to build fortifications thereon ; would it not be a simple matter for any of the greater maritime powers to blockade both ends of the canal, and thus prevent all American vessels from approaching it ? Unless, therefore, the United States possessed a navy able to cope with that of other maritime States, and even with any possible combination of such States, the canal would, in time of war, be entirely useless for us. But if we possessed such a navy, it is clear, we should not need to fortify the canal. The assertion, moreover, that England would disregard the provisions of the treaty, which were expressly based upon the contingency of war between the two countries, is an unwarrantable assumption ; even granting the desire to do so, England's treaty relations with other States are too important for her to set the example of bad faith towards other States. Indeed, England has been the foremost State in Europe in insisting on the faith of treaties.

But these arguments do not exhaust the objections to the Clayton-Bulwer treaty ; it is said that to permit any European power to take part in protecting an isthmian canal, would be in conflict with the principles of the Monroe doctrine. The Monroe doctrine, although never anything more than a doctrine, has a strong hold upon the American mind ; it has had, too, no inconsiderable restraining and moral effect upon Europe. But it is often misunderstood in this country, and may be easily misapplied.

The declaration of President Monroe, in 1823, had a definite purpose ; namely to defeat the machinations of the so-called

"Holy Alliance," which, having suppressed by force of arms all popular demonstrations in Europe, proposed to transfer its activity to this continent, to restore the monarchical principle in the Spanish-American republics, and, perhaps, to attack the United States. The declaration was, therefore, a defensive measure ; the European Alliance had announced a policy which was thought to be dangerous to the interests and the peace of the United States. Now the particular circumstances which called forth that declaration have passed away forever. Since that time, Europe itself has become, to a great degree, democratic ; and with this change, the spirit of monarchical propagandism has ceased to exist.

The danger of European aggression has been lessened, too, by the fact that the Spanish-American States, still struggling for their independence in 1823, are now recognized republics of nearly seventy years' standing. And this is well understood in South America. The minister of foreign affairs of the Argentine Confederation said, in 1881, that "happily the day has gone by in which political combinations on this continent had for their principal object the preserving of their independence against foreign aggression and machinations. Europe no longer harbors any thought of conquest or of chimerical vindications."

It must be admitted, however, that there is a tendency on the part of several leading European States to extend their dominion in the interest of their navigation and trade. At present this tendency shows itself in the inordinate desire to plant colonies in all places not yet occupied by civilized societies ; and it is by no means improbable that, did a favorable opportunity offer itself, they would attempt to gain vantage-ground on the continents or islands of this hemisphere. It ought not to be expected that the United States will be an indifferent spectator of these movements, at least, where their interests are at stake, whether it be a question of the American continents or of islands in the Atlantic or Pacific. But it is not necessary to attempt to stretch the Monroe doctrine so as to include every possible case, nor to exclude other cases from its effect. We have outgrown the Monroe doctrine, and ought to be able to have a foreign policy entirely independent of it. The United States are large in extent of territory, and strong in material resources, and stronger still in their defensive position between two oceans. There is no longer any occasion, as there was in the early part of the century, to fear those "entangling

alliances" with European powers, in regard either to European or American affairs. It was not contemplated by Washington, when he so earnestly enjoined upon his countrymen a policy of isolation, that we should always hold aloof from the rest of the world. The danger, as he saw it, would pass away so soon as the infant State should have arrived at the vigor of manhood. There would come a time, he said, when the United States could choose war or peace at their pleasure. What, then, is the sense of adhering, in the strict letter, to a policy adopted, of necessity, in the early period of our history, but the reason for which no longer exists? In this age of steam and electricity, the different countries of the world have been brought wonderfully near to one another, in comparison with fifty years ago. The United States have interests in all parts of the world, and there may come a time when they could properly exert an influence for good. Certainly it is not a time when we should adhere to a Chinese policy of exclusion in regard to the American continents.

The real danger is rather that we shall change the Monroe doctrine from a defensive into an aggressive policy; that we shall not only keep European powers away from the American continents, but that we shall revive their methods, in extending our boundaries and our dominion, or, perhaps, set up an American "Holy Alliance." When we speak of making the proposed canal our southern coast line, we go far in that direction. We should then be doing, in the supposed interests of trade, what was, at at an earlier period in our history, done in the interests of slavery. In adopting such a policy, we should, moreover, alienate the sympathies of the Spanish-American States, with their forty-five millions of inhabitants, and force them into the arms of Europe. There have been already indications of such a result. Spanish-Americans are not slow in detecting signs of aggression on our part. A Central American newspaper declared, on August 4, 1881, that "we should suffer an undeception, if the government of the United States, representing a great people, ruled by exemplary institutions, should adopt with the other sister nations of America, before the world, which looks on with lively interest, a policy, troublesome, radically egotistical, that would sacrifice the sacred principles of justice to the spirit of *mercantilism*, overpowering and dangerously developed."

A very intelligent South American, Mr. Sarmiento, then Argen-

tine minister in Washington, said, in 1866, "The Federal system is the most admirable combination which chance ever suggested to the genius of man. . . . But it is dangerous to convert the Federal system into an invading republic, swallowing ever, without being able to digest. The experiment has never succeeded. . . . The Monroe doctrine must be purified of all the stains by which the hand of man has dimmed its lustre. . . . The United States ought to say that it is the country which lies between two oceans and two treaties ; and the day after it has said so, the Monroe doctrine will be accepted by the international law of Europe, thus removing the greatest source of present peril." ¹

Now, as to the much-maligned Clayton-Bulwer treaty, what have been and what are its dangers or disadvantages for us? In the first place, its restrictive clauses have effected all that the makers of the treaty expected of them ; they have kept Central America from falling under the dominion of England,—a fact of the first importance. Having gained this great object, it would seem hardly just to say to England now : "We have no longer any need of the treaty ; we can look after the canal ourselves." England might very well reply, as in 1857, that, in that case, she should insist upon being placed in the same position in Central America which she occupied before the treaty was made. But, aside from this consideration, the Clayton-Bulwer treaty probably offers the best possible solution of the canal question, namely, in the clause which contemplates the invitation to all interested States to join in the protectorate of the canal ; in other words, the neutralization of the canal. By the adoption of this plan, the United States would gain all the advantages which a canal would offer, and without the necessity of keeping on foot an enormous navy, or of entering generally upon a career of militarism, which is at this moment the calamity and the danger in European nations. As Dr. Wharton pointed out : "Such an international agreement entered into by all the great powers, would not be in conflict with the Monroe doctrine. For an agreement that no powers whatever should be permitted to invade the neutrality of an isthmus route, but that it should be absolutely neutralized so as to protect it from all foreign assaults by which its freedom should be imperilled, is an application, not a contravention, of the Monroe doctrine. Such an agreement is not an approval of, but an exclusion

¹ Discourse before the Rhode Island Historical Society, 1866.

of foreign interposition." ¹ There would probably be no objection on the part of European States to the United States taking a leading part in the management of the canal; that would be a natural consequence of our position.²

On the other hand, if we set aside the Clayton-Bulwer treaty, and attempt an exclusive control of the canal, we shall encounter many difficulties. More than half the world is interested, politically or commercially, in the isthmian canal; and it is more than probable that all the maritime States of Europe and America would combine to oppose our exclusive control of it. In the case of the Panama route, moreover, the sole basis of our claim is the thirty-fifth article of the treaty of 1846 with Colombia, which may be abrogated at any time by a twelvemonth's notice on the part of Colombia, and thus leave us without the semblance of a legal right to a protectorate over that route. In regard to the Nicaragua route, it is said that we should be able to control it by annexing Mexico and a part of Central America. Herein lies the real danger of such a policy; and the warning of Mr. Sarmiento applies to it. To take into our Union twelve millions of people, of a race totally different from ours in temperament, in traditions and laws, in capacity for self-government, and in their habits and religion, would introduce an element of discord and perpetual trouble, which it would be the part of wisdom to avoid. And it would be avoided by the neutralization of any future isthmian canal.

This discussion has turned mainly on the question of expediency, — what would be for the best interests of the United States? A broader view of the subject was taken by many of the earlier statesmen of this country; and that view was also expressed by President Cleveland in his first annual message, when he said: "Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities, or a prize for warlike ambition. An engagement, combining the construction, ownership, and operation of such work by this government, with an offensive and defensive

¹ Digest of International Law, II, 243.

² The argument of Mr. Blaine as to England's control of the Suez canal has, of course, turned against him, since, by the joint action of the European powers, on the 29th of October, 1888, that canal has been neutralized.

alliance for its protection, with the foreign State whose responsibilities and rights we should share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means."

Freeman Snow.

CAMBRIDGE.

STATUTORY REVISION.

IMPORTANT problems in the science of law arise to-day from the great and constant increase in the authoritative literature of the subject. In respect to case law there has been much discussion of the possibilities of abridgment by codification ; but codification has not as yet, either in England or in this country, gone far beyond the stage of discussion ; at least there has been no serious attempt on any considerable scale to make a codification which shall undertake to dispense with existing reports.

The difficulties which arise from the increase of reports are met, first, by a higher classification in the later digests, and, secondly, by the development of a class of elaborate text-books devoted to narrow heads of the law. It is often easier to-day, by the aid of the best text-books and of the highly classified new English digests, to find the decisions upon a given point from out the vast library of English reports, than to find the law on the same question in the reports of one of our States.

In spite of numberless propositions to the contrary, made through a long series of years, England has pursued, with reference to the great body of her statute law, the same course which she has followed with regard to case law ; that is to say, she has not cut across the regular flow of legislation by statutory codification. In certain subjects redrafts of existing legislation have been made ; but as to the great mass of the statutory law of England, one must either look to the unofficial compilations on different subjects, or else, by the aid of the modern statute tables and indexes, seek to ascertain for himself, from the whole course of legislation, what is the statute law upon a given subject.

The State of Michigan has provided in its constitution that "no general revision of the laws shall be made." The State of New York made a revision in 1829 of its then existing statute law ; but since that time, and in spite of a provision in the Constitution of 1846, providing for codification of both statute and common law, New York has, except in certain limited subjects, lived upon the English plan, leaving the compilation of statutes and the posting up of the Revised Statutes of 1829 to private enterprise.

In the Federal Government, however, and in nearly every State in the Union, a different practice has prevailed. While in case law the profession have, as a whole, been content to rest with improved digests and with an increasing specialization in text-books, in the matter of statute law there has been entertained a more sanguine conviction. It has been generally assumed that it is possible for a community, from time to time, to take an account of stock, so to speak, of its statute law ; to summarize, classify, and reprint it, and then, at least for the purposes of most practical occasions, to cast off the statute-books of prior date, and let them go.

" Built up its idle door,
Stretched in its last-found home, and knew the old no more."

The burden of a lengthy and ever-increasing series of statutes is, unquestionably, a great one, and efforts toward relief are most commendable. The question is : Have such efforts as have been made throughout this country for the past sixty years been in any sense successful ?

It is proper here to remark that in no other field of study has it been found possible to cut loose from history. If, now, it has really been established in this country that it is possible, from time to time, in so difficult a science as that of law, to free the present from the past ; to make the records of the past no longer vital to the understanding of the present ; if, in a word, it is possible for a highly organized, law-making community, once in ten or twenty years, to start afresh, with *tabula rasa*; to sum up and state its whole body of statute law in the pages of one book, and to pass over its earlier statutes to antiquaries, certainly a great and striking discovery has been made, not only in the science of law, but in the science of the workings of the human mind.

It is proper to clear the ground by two preliminary statements.

In the first place, it is, of course, possible to introduce bodily an entirely new system of law into a given country and to part company once and for all with the old, providing the new system is really a new one, and not an amendment to the old. In such case, whether the system introduced covers the whole field of law or only some one head, the system which it supplants cannot be looked to for interpretation, because it has no historical relation with the new system. It was possible, for instance, to introduce into Louisiana, by one brief enactment, the whole English common law of crimes in substitution for the French law of crimes. So it would be possible by statute to introduce into Scotland the existing common and statute law of England, and in that case the meaning of a modern statute would be sought by the Scotch courts in the early English, and not in the early Scotch statutes. In the second place, the writer is far from denying the value of text-books of statute law, such as Throop's Revised Statutes of New York. The reasons which lead to the use of text-books and digests of case law appear to him to point to the use of unofficial text-books, tables, and indexes of statute law ; and his criticisms will be confined to authoritative statutory compilations.

Let us proceed, then, to the main inquiry ; namely, what measure of success revisions have attained, and how far that success has been offset by difficulties which they have brought in.

It would seem that the theory upon which official statutory revision must proceed is, that it is possible for a legislative body at a given time to present the whole existing statutory law, in a clear and symmetrical statement which will explain itself to the reader, and will, unless in exceptional cases capable of being distinguished and known, and of which one may have fair warning, dispense with the necessity of going back to the original statutes. If this is not the theory, then a revision is nothing but an index to prior statutes ; and as an index it is utterly faulty, by reason both of its statutory form and of its enormous size.

Now, nothing has been more conclusively established by the experience of this country than the fact that no statutory revision is in any sense a finality. The reports of our States are full, from beginning to end, of cases which, in construing sections of Revised Statutes, or General Statutes, or Compiled Statutes, however they may be entitled, go back to the original acts for the meaning of the language of the revision. Although such

cases are extremely common, it may be well enough to refer to a few of them for illustration ; and since the reports of any one State and the memory of every lawyer provide a sad abundance of material of this sort, the writer has not thought it necessary to attempt any geographical distribution of his few citations, but will use such cases as are at hand, in his own State, drawing his illustrations, for fairness, from all three of its revisions.

The Revised Statutes of Massachusetts, c. 64, sect. 4, provided that creditors of a person deceased might administer, in case the widow or next of kin should "neglect, without any sufficient cause, for thirty days after the death of the intestate, to take administration of his estate." This language would seem quite plain. In *Arnold v. Sabin*, 1 Cush. 525, a case arose where the widow and next of kin did neglect without cause for more than thirty days to apply for administration. They brought forward, however, St. 1817, c. 190, sect. 14, the original act, which provided that creditors might administer, but only in case the widow or next of kin should refuse or neglect to take out administration, after "*being cited before the judge of probate for that purpose ;*" and the court read this important qualification of the original act into the language of the revision.

The Public Statutes of Massachusetts, c. 126, sect. 18, give a right of action against the grantor in a deed to an assignee of the grantee, for a breach of a covenant against incumbrances, provided the incumbrance "appears of record." An action was brought under this provision for an incumbrance appearing of record, namely, for a tax-lien appearing on the records of the town in which the land lay. The defendant contended that the words of the revision were nothing but a reenactment of a similar provision in the General Statutes of 1860, based in its turn upon a statute of 1855 ; that by the context in the original act the word "record" appeared to refer only to a record in the registry of deeds, and that therefore that qualification should be read into the language of the Public Statutes ; and the court so held.¹

These cases did not involve matters of complication or intricacy ; and if a lawyer cannot trust the reading of the latest revision upon such matters as these, he cannot trust it in anything.

It is sometimes urged that while to a trained lawyer an official revision may be at least superfluous, and an unofficial compilation

¹ *Carter v. Peak*, 138 Mass. 439.

might suit his purposes quite as well, there is, nevertheless, a large class of semi-legal men for whose use must be provided a homely summary of existing statute law, roughly accurate, in a form in which they can comprehend it.

Let us look into this. That class of persons is well represented by trial justices, who very often are not lawyers, although they have a very considerable jurisdiction. In *Commonwealth v. Harris*, 8 Gray, 470, the every-day question arose, upon language of the Revised Statutes, whether a justice of the peace, having jurisdiction to try, could decline final jurisdiction and bind an offender over. It was important in such a case as this, if it is ever important, that a lay magistrate should be able to ascertain his powers and duties by reading the latest revision; but the Supreme Court, in their opinion, found it necessary to go back through a long train of statutes with reference to the powers and duties of justices of the peace, beginning with a statute of 1646, and running through statutes of 1692, 1783, 1785, 1794, and 1804, to settle the question.

The Public Statutes of Massachusetts, ch. 127, sect. 21, provide that when any testator omits to provide in his will for any of his children, they shall take the same share of his estate as if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it shall appear that the omission was intentional, and not occasioned "by any mistake or accident." A man died intestate, having, as he supposed, given a house and lot to his daughter. In fact, he had not made a good title to her. Owing to his mistake of fact, he left his daughter out of his will. She brought suit for a share of his estate, claiming that the omission in his will of a provision for her was "occasioned by" a "mistake." Her case was a hard one, and she came completely within the language of the statute. Her opponents contended, however, that the words "any mistake or accident" must be construed to mean only mistakes and accidents directly connected with the writing of the will, and not to include mistakes and accidents as a result of which the will was intentionally drawn up as it was drawn, although in a way in which it would not have been drawn but for the mistake. The court, having before them a brand-new re-statement of the whole general statute law of Massachusetts, had, on the revision theory, nothing to do but to read the revision. Instead of doing so, they

went back, making way-stations of the prior revisions of 1860 and 1836, and finally discovered the head of the stream in a Provincial statute of 1700-1701, which has the following preamble: "Whereas, through the anguish of the deceased testator, or through his solicitous intention though in health, or through the oversight of the scribe, some of the testator's children are omitted and not mentioned in the will . . ." Upon the strength of this preamble as interpreting subsequent legislation, and in accordance with prior decisions in the same direction, the court introduced a qualification into the broad words of the Public Statutes, and made them read, not "any mistake or accident," but "any mistake or accident *directly connected with the making of the will*," and so excluded the daughter.¹ If there is any one thing in Massachusetts which plain men of semi-legal training are constantly engaged in, it is the settlement of matters in probate courts, including the payment of shares to legatees or distributees, and the examination of country titles. It is not uncommon to find a will which comes within the provision of this statute, and distributions are being made and titles are being passed under such wills constantly. The writer cannot understand how a plain man engaged in legal matters is at all benefited by having before him the revision of 1882, since it is incumbent upon him to know a qualification introduced into that revision by the preamble of a statute of 1700.

Such cases as the last two cited, — and the citations could be multiplied indefinitely, — dispose utterly of the theory that laymen undertaking legal duties have in a revision a *vade mecum* which they can read and construe themselves. "Understandest thou what thou readest? How can I, except some man should guide me!"

It is sometimes urged that the general lay public have a right to have their statute law presented to them in a form capable of easy reference, in order that they may ascertain for themselves, in simple matters of daily conduct, what they can or cannot do, and that they ought not to be compelled to go to a lawyer in every little matter. What there is in this position is illustrated by *Commonwealth v. Bailey*, 13 Allen, 541. Two fishermen from Newburyport, in 1866, took, between them, eight bushels of clams, for bait, from a beach in Ipswich. They were prosecuted for violation of an apparently simple section of the General Statutes. The

¹ *Hurley v. O'Sullivan*, 137 Mass. 86.

Supreme Court, in construing the language of this section, began with the Body of Liberties of 1641, and pursued the history of the enactment in question through the Colonial laws of 1660 and 1672 ; considered Felt's History of Ipswich, and referred to five different Provincial statutes, to statutes of 1793, 1795, and 1796, to reenactments in the Revised Statutes of 1836, and to acts of 1838, 1841, and 1844, and so led up to the clause of the General Statutes upon which the fishermen were being prosecuted.

But the inquiry in that case went further. Granting that a fisherman had the right to take seven bushels of clams at one time, for bait, the government still claimed that these two men, having come from one vessel, could only take seven bushels between them, or what one could have taken alone. They had taken eight bushels. The statute seemed extremely plain. Nothing in it — so it read — was to be construed “to prevent *any fisherman* from taking any quantity of shell-fish which he may want for bait, not exceeding at any one time seven bushels, including their shells.” But the court, on going back to the original act, — a statute of 1799, reenacted in the revision of 1836, — and by comparing that act with a statute of 1795, interpolated into the revision, as the result of a close course of reasoning, after the words “any fisherman,” the qualification “coming alone,” and held that these two men had the right to take only seven bushels between them.

All this legislation it was necessary these men should know before they could read five or six lines of the General Statutes, which would have seemed to them, if they had read them, to speak with authority and not as the scribes.

So much for the advantage which the plain man is to derive in the guidance of his daily affairs from the perusal of a statutory codification. If a fisherman cannot read a bait statute, how can any layman read any statute ?

It is no answer to the criticisms now made to say that out of the whole number of cases in any one volume of reports construing the language of a revision, only a few actually disturb or go behind its language. That only indicates, what might be conceded without injury to the argument, that in the great majority of instances, either the language of the revision is the language of the prior statutes, or that there turns out to be nothing in the history of the statute to qualify the revision. Nor does it follow from the fact that in such cases the courts do not in their opinions

discuss prior statutes, that counsel did not examine prior statutes in preparation for argument. It being once established as a principle of construction that the language of a revision is not a finality, it becomes incumbent upon counsel in every question turning upon a clause of a revision, to examine the prior legislation in order to see what the revision means. The fact, if such it is, that in the great majority of cases they find that it is not so qualified, but that the language of the revision means what it says, does not alter the fact that they have had to make the examination to ascertain this fact. It is true in most fields of inquiry that the greater part of our looking is for what we do not find. In searching a title through the records one examines a hundred conveyances, not because they in fact affect his lot, but because he cannot know until he has read them that they do not affect it. It is often not what one finds, but what one looks for, that takes time. Granting, for the sake of argument, that in the great majority of the sections and clauses of a given revision there is nothing under the surface, — the fact remains that there is no way of pointing out where the air-holes are. If it were possible to single out the weak spots in a revision and mark them with a danger-signal, the case would be different. But it is not possible; and not only can it not be told what are the weak spots, but of very few sections can it be said that important cases may not arise upon a construction of them. The law of bailments rests upon the bilging of a cask of wine. A code, like any other labor-saving invention, is to be judged, not by the weakness of every part, but by its constant liability to break down in some part. No sham construction ever gives out at every point. If a skater ventures out upon thin ice and breaks through, it is no satisfaction to him to have it pointed out that there were a great many hard places where he could not have broken through.

Thus far the writer has confined himself to pointing out weaknesses and deficiencies in statutory revision, and to the suggestion of ways in which a revision "keeps the promise to the ear, but breaks it to the heart." It is proper now to suggest some affirmative ills which follow in the train of a revision.

In the first place, it is a trap for the unwary. Persons who trust its language, whether idly or from ignorance of what lies beneath that smiling surface, are liable at any moment to drop into a pitfall.

Another and a very distinct evil brought in by statutory revision is, that while it does not relieve either a lawyer or a layman from the necessity of knowing every statute that is or ever has been passed which may throw light upon a clause in a revision, either historically or by a process of comparison, it brings in an element of legislation foreign to the natural flow of proceedings, and to be construed on different principles, so adding to the subsisting burden of going to the original enactments, the new labor of deciding whether or not, and to what extent, the revision has introduced a modification. And this presents a peculiar class of statutory questions. Sometimes the courts say that a change in language in a revision means a change of law; sometimes they say, as in *Arnold v. Sabin*, cited above, that it must not be supposed from the change in language, that a change in law was intended; and it is often impossible to establish in advance whether the courts will view a given change of expression in a revision as rhetoric or as legislation.

A third difficulty which comes from revisions, aside from the bulk which they add to the mass of our statutory law, is the duplication of that bulk in the printed commissioners' report which ordinarily precedes the enactment of a revision. The commissioners' report, when it differs, as it often does, from the original acts, or from the revision which follows, fixes another point to be observed forever in projecting a legislative curve. We have, in Massachusetts, in addition to the regular series of annual statutes, and the three revisions, three very large volumes of commissioners' reports, which we must, apparently, carry on with us to the latest futurity, since the courts construe existing statutes by them.

Another feature which revision introduces is the notes of revising commissioners, upon different sections, explaining how far the commissioners propose, by a certain change in phraseology, to change the law. It is very common for judicial opinions to refer to such notes as bearing on the construction of language of a revision. And this is not all. In a recent case (*Bent v. Hubbardston*, 138 Mass. 99) a provision of the Public Statutes of 1882 is construed in the light not only of the data above specially considered, but of the preface of the commissioners' report. This preface states in rather modest terms the aims of the commission. Partly upon the strength of this

preface, the court hold that a certain change of phraseology in the Public Statutes, consisting in the omission of two or three important lines, indicates no intention on the part of the Legislature to change the law. That is, in construing a quite plain and simple sentence in a revision of 1882, we are to examine not only all prior legislation on the subject, including revisions, and also commissioners' reports, with their notes, and the resolve under which the commissioners acted, but are to bear in mind at every moment, in reading the revision, the degree of forwardness or self-restraint on the part of the commissioners, indicated in the preface to their report.

It is assumed that all this, while it does not dispense with the examination of the line of original statutes, in some way simplifies the consideration of them.

The writer would like, if there were space, to speak of the enormous cost of revision. He would be glad to speak also of the errors which invariably result : for instances of error are numerous. He will, however, close by speaking of one evil which seems to him a great one. While a revision is in no sense a finality, and is hardly an authority, and is at best nothing but a peculiar kind of text-book, it differs from text-books proper, like Throop's Revised Statutes, or Crocker's Notes on the Public Statutes, in this : that it cannot be thrown away when a new edition appears, but, being to some extent—and nobody can know to just what extent—legislation, and not mere statement, it must be dragged along forever. It is a cardinal principle of statutory law that a statute, like a sin, is ineradicable. It may be repealed ; but an argument immediately arises, phoenix-like, upon the fact of the repeal. That is the great trouble in statute-making : that we can never shake off a statute unless, perhaps, in some cases where the subject-matter of the legislation has entirely disappeared. The courts of Massachusetts, with a revision of 1882 before them, are construing now, in every volume of reports, revisions of 1836 and 1860, as well as early Massachusetts and ancient English statutes. Text-books, with rare exceptions, we can shake off ; and in this distinction lies one great argument for unofficial revision. A private statutory text-book we can at last throw away ; an official revision, which is not much more of a finality than a text-book, clings and clings like an Old Man of the Sea.

In every community, as in the mind of every man, there run at

the same time opposite currents of opinion and belief. While the State of Massachusetts was expending a fortune in its last revision, of 1882, it was proceeding with the publication, in five large volumes, at a great cost, of the Provincial Acts, from 1692 to 1780. Those acts are being constantly referred to by the courts, and the fact was appreciated that the bar should have access to them. But the issue of these ancient originals was a striking proof of a strong eddy of conviction, that in the projected revision one would really find no rest for the sole of his foot. While such a publication of ancient enactments emphasizes the greatness of the burden resting upon us in the legislation of our ancestors, it pronounces upon our modern revisions the condemnation of the prophet: "They have healed the hurt of the daughter of my people slightly, saying, Peace, peace ; when there is no peace."

H. W. Chaplin.

Boston.

HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2 50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
AARON C. THAYER,	EZRA R. THAYER,
WILLIAM G. THOMPSON.	

THE following imaginary Crown Case reserved was lately argued at the University of Cambridge in a moot court before Professor Maitland:—

"John Styles was indicted before me at the late Assizes for larceny of a portmanteau, the goods of William Vokes. The facts proved were these: William Vokes was keeper of the White Hart Hotel at Blankborough. On the 5th of June Styles arrived at the hotel, bringing with him the portmanteau. He engaged a bedroom, ordered dinner, which was supplied, and occupied the bedroom during the night. On the next morning he told the landlord that his portmanteau wanted a new lock, and he asked at what shop he could obtain one. The landlord told him of a shop. The prisoner called a cab, fetched his portmanteau from the bedroom, and placed it in the cab, and then (the landlord being out of hearing) told the cabman to drive to the railway station, where the prisoner took the train which was on the point of leaving for London, taking his portmanteau with him. He had not paid his bill at the inn. Upon these facts I directed the jury that, if they were of opinion that the prisoner took the portmanteau from the inn with intent to avoid payment of his bill and to deprive the landlord of any right that he had to detain the portmanteau, they should find the prisoner guilty of larceny. They found him guilty. If the court should be of the opinion that this direction was right, the conviction is to be affirmed: otherwise, it is to be quashed."¹

AN article in the last "Green Bag," entitled "Putting New Wine into Old Bottles," by Seymour D. Thompson, Judge of the St. Louis Court of Appeals, calls for a remark or two. It would be hard to dissent from the affirmative part of Judge Thompson's advice, that judges and lawyers should think for themselves,—his own article, indeed, indicates more clearly, probably, than was intended the importance of serious and instructed thinking,—but the remarks on the "old musty books" of law in which we are urged to "stop rummaging" are not very intelligent.

Exactly what is the position which Judge Thompson would take? Does he mean that there is a disposition in this country at the present time to pay an undue regard to ancient authority, and in

¹ 5 L. Q. Rev., pp. 227, 228.

doing so to set aside reason and common sense? If so,—and his objection seems to be rather to the antiquity of the cases than to the frequent ignorant and ineffective handling of them, of which a point might well be made,—he would do well to give us some instances of this tendency. Does he believe that a judge of to-day can safely strike out for himself, relying on his own powers and disregarding the fact that the law with which he deals is the product of centuries of slow growth and development? Then the greatest of our lawyers and judges have been on the wrong track. One has only to read, for example, the opinions of Lord (then Mr. Justice) Blackburn in such cases as *Redhead v. Midland Railway Co.* or *Rylands v. Fletcher* to see how the greatest living authority in the common law has brought its past to bear on the question before him. And in the light of modern historical study it would be easy to multiply cases in our own century where the most learned judges have been in the dark from the failure to apprehend the process of growth by which the law had reached the point at which they found it, and have added to the confusion by their discussions.

If, as Judge Thompson tells us, our ancestors of the Elizabethan period were, compared with us, "barbarians compared with the civilized man," it would certainly be unadvisable to spend too much time over their productions. But Judge Thompson's argument would be stronger if he would designate a few of the "moderns" compared with whom Lord Coke and Sir Francis Bacon were "children" "in intellectual stature."

WE have received from Mr. Samuel B. Clarke, of New York, a copy of his essay entitled "Current Objections to the Exaction of Economic Rent by Taxation Considered," read at the September, 1888, meeting of the American Social Science Association.

It is the purpose of the paper "to set out the essential reasons for approving George's plan, and to point out with reference to the current criticisms upon his doctrine wherein they fail to meet those reasons." Although Mr. Clarke advances no new arguments for the "single tax system," yet the clearness and conciseness with which, from a judicial standpoint, he presents the fundamental propositions on which George's argument rests, together with the most weighty objections to prevailing systems of land tenure, certainly entitle him to the gratitude as well of the opponents as the friends of George's proposed innovation.

Mr. Clarke says, "The fact that land has a value which is unearned by the occupant is no ground at all for exacting such value, if the land is really his. But if it is not his, the fact that its value measures natural differences and the general need of the people for land enables us to do with great simplicity and reasonable approximation to accuracy what otherwise there would be no practicable way of doing at all." This is the theory and practice of George's plan in a nutshell.

Whether land *is* the property of the present so-called owners, that is to say, whether the legal duties and liabilities usually connoted by the term "ownership in fee" are in accord with the dictates of what Mr. Clarke would call "natural justice," or "natural rights," we leave to the readers of his admirable monograph to determine.

¹This essay is an amplification of an article by the same author in 1 Harv. L. Rev. 265. See also *ib.* 344.

THE Legislatures of our States are asked almost every year to make some changes in the law of libel in the interests of the newspapers. A typical example of such legislation is a bill now before the New York Legislature, of which the following section contains the most radical change contemplated in the common law of libel: "§ 1908. In any action hereafter to be maintained for the publication of a libel in any newspaper, magazine, or other periodical in this State, unless the plaintiff shall prove upon the trial either malice in fact, or that the defendant, after having been requested by him in writing to retract the libellous charge or statement in as public a manner as that in which it was made, has failed to do so within a reasonable time, he shall recover nothing but such actual damages as he may have specially alleged and proved." In the Massachusetts Legislature there is now under consideration in committee a bill very much to the same effect.

Similar laws relating to newspaper libel have been passed in Minnesota and Michigan; but in the latter State the law has been declared unconstitutional by a unanimous decision of the Supreme Court,¹ on the ground that it is class legislation. In Minnesota the law has been declared constitutional by a divided court.²

Whatever may be said in regard to the constitutionality of such laws, it is plain that they do not promote the ends of justice. The common law affords ample protection to the defendant. The rule that the truth is a defence gives greater immunity to the press than appears at first blush. For one who has been libelled, though he may know that the defendant cannot prove the truth of the charge, will hesitate a long time before bringing action, because of the ruthlessness with which his past record will be handled on the trial by evidence which can be admitted under this plea. Then, again, privileged communications cover such a wide ground that a respectable newspaper can keep clear of libel suits while maintaining a proper fearlessness and independence in a discussion of public affairs.

A little consideration will show the doubtful justice of laws similar to the one now before the New York Legislature. Such a provision would, of course, affect only such communications as are not privileged. The publication of libellous matter is due to a desire usually to print something which will cause the paper to sell, not to any malice against the individual; consequently the plaintiff, being unable to prove malice, can only recover for *actual* damage. Again the plaintiff fails because defamation affects primarily a man's reputation, and seldom causes such pecuniary loss as can be proved. The plaintiff is thus left practically without remedy. A man's right to reputation is as sacred as his right to life and liberty, and should be guarded as carefully.

PROF. MELVILLE M. BIGELOW'S excellent little book on the law of Torts, so well known to students in this country, has lately appeared in an English edition from the University Press at Cambridge. This edition was prepared at the special request of gentlemen connected with the University of Cambridge for use in the law instruction at that university, where Mr. Bigelow's earlier volume was already used as a text-book. The new edition has been largely rewritten. Certain changes were of course necessary in presenting, as the author has

¹ 39 Alb. L. J., 314.

² Ibid. 294.

undertaken to do here, the law of England rather than the law of America; but beside these changes a valuable Introduction has been added to the book, a separate chapter on "Malicious Interference with Contract" appears for the first time, and many chapters, especially that on Negligence, have been enlarged and materially altered. It is noticeable among other things, that Mr. Bigelow has considerably modified his views on Imputed Negligence, in line with recent decisions.¹

It is noticeable that in the recent New York case of *Presbyterian Church v. Cooper*, digested in this number of the REVIEW, neither court nor counsel referred to the well-known case of *Lawrence v. Fox*,² decided by the New York Court of Appeals in 1859. There it was held that where a contract was for the benefit of a third party, the beneficiary could sue the promisor, and that "the law operating on the act of the parties, created the duty, established the privity, and implied the obligation on which the action is founded."

In *Church v. Cooper*, defendant signed a subscription paper for the benefit of the church, containing a condition that his promise should be void if the whole sum needed were not subscribed within a year, and reciting the consideration as follows: "In consideration of \$1.00 to each of us (subscribers) in hand paid, and the agreement of each other in this contract contained, we agree," etc. The church was the nominal promisee, but defendant proved that the \$1.00 had not in fact been paid. The court held that, admitting a bilateral contract to exist between the several subscribers, yet plaintiff, being a stranger both to consideration and promise, could not recover.

It would seem that here, if anywhere, the anomalous doctrine of *Lawrence v. Fox*, and of the cases in other States which follow it, e. g., *Holsteller v. Hollinger*, 12 Atl. Rep. 741 (Pa.), *Nat. Bank v. Grand Lodge*, 98 U. S. 123, etc., would, if applied, have worked substantial justice, and carried out the original intention of the parties. Clearly, in an action between any subscribers, only nominal damages could have been recovered; but in view of the facilities for equitable relief in such cases this argument has little force, and, indeed, seems likely to be abandoned by the court that first used it to establish the legal right of a beneficiary to maintain an action on the contract.

"THE GREEN BAG," edited by Mr. Horace W. Fuller, though styled "A Useless but Entertaining Magazine for Lawyers," is, in reality, both entertaining and useful. The opening number is especially attractive to those interested in the Harvard Law School. Louis D. Brandeis, Secretary of the Law School Association, contributes an excellent article on "The Harvard Law School," which is illustrated with portraits of Story, Greenleaf, Parker, Parsons, Washburn, and Langdell, and views of Dane and Austin Halls, and gives a full and clear account of the origin, growth, work, and purposes of the Law School. The number also contains a valuable article by Professor Ames on "Specific Performance of Contracts," which gives an historical review on the earliest cases on the subject.

¹ See the recent case of *Mathews v. London Street Tramways Co.*, 60 L. T. Rep. n. s. 47, approving *The Bernina*, 13 Appeal Cases, 1. It is to be noticed, however, that the case of *Waite v. N.E. Ry. Co.*, E. B. & E. 719, has never been expressly overruled, nor has a precisely similar case since arisen. See also *Markham v. H. D. N. Co.*, 11 S. W. Rep. 131 (Texas) *infra*, p. 93.

² See article on Priority of Contract, 1 Harv. L. Rev. 226, for a discussion of *Lawrence v. Fox* and kindred cases.

CORRESPONDENCE.

LEIPSIG, December, 1888.

GERMAN universities to-day are what Bologna was in the thirteenth century; perhaps nowhere else can be found such a cosmopolitan gathering as in Berlin. Libraries and museums aid the fame of the professors in drawing together some six thousand students, twelve hundred of them to pursue the study of law.

One would think that the conveniences for study, the buildings, the libraries, would be excellent here. But not so; a former palace is converted into a building for lectures, with rooms either too small or too large, and ventilation only the object of theoretical study. The lower officials are none too obliging; indeed, in the Royal Library they are very unaccommodating. The Royal Library has an excellent collection of law books, though it has but few on English law. The reading-room is open until seven o'clock; and in every department many of the leading books and periodicals are placed in reserved alcoves, as in Gore Hall. The University Library has a much more limited collection, and offers but few additional advantages to the law student. In Leipzig, the Supreme Court Library contains a very complete collection of books on Roman and German law, and most of the English reports. The United States Supreme Court reports, and quite a number of the leading text-books and periodicals on the English common law, especially on commercial law, are to be found here. But, unfortunately, the temporary court building is so small that the privilege of using the library is granted to students only for very special reasons. In connection with the law seminars there is a small collection of the most necessary books, well arranged, and accessible at any time during the day in Leipzig, but only for one hour a week in Berlin.

About the only restraint on the highly valued but, at any rate, in many cases, somewhat demoralizing academic freedom, is the rule that one course must be paid for—attendance is not required—during each semester. No one troubles himself about the student; he listens to lectures or not as he pleases; and when he is ready to stand the examination, he announces himself. He must show the professors' signatures in his student's book to a certain number of courses paid for during at least six—in Bavaria eight—semesters, including, perhaps, two semesters during which he served in the army. If he pass the examination satisfactorily,—and, in the case of the University examination, write an acceptable essay,—no questions are asked as to how he acquired his information.

The law courses offered in the German universities vary from seventy-five or more in Berlin, to a dozen in some of the smaller universities. One of Berlin's chief advantages over Leipzig is the choice one has there of hearing one of several lectures on the same subject, and thus the better opportunity of avoiding a conflict of courses. During the first semester, the history and institutions of Roman law, the philosophy of law, and jurisprudence are usually taken up. In these courses the

various legal and political institutions of Rome, its public and its private law, are developed from their beginnings to the time of Justinian. The citations are chiefly from Justinian's and Gaius' Institutions. Pandects, or that part of the common law of Germany which is based on the Roman law, form the main work of the second semester. No course is given in German law corresponding to the institutions of the Roman law; but the course on the history of German law is made to include the treatment of many of the institutions of private law, as well as the entire public law of the Teutonic tribes of the German empire to the period of the reception of the Roman law in Germany. The development of the private law from that time to the present day, so far as it has maintained itself against the Roman law, either as Roman law for all Germany, or as a part of the particular law of any of the German States, is the subject of the course on German private law, corresponding to the Pandects for the Roman law. On the Continent commercial law is sharply divided from the general civil law. It is applicable only to a limited class of people, and is often administered by separate courts. It is considered necessary in these lecture courses to cover the whole subject. This necessarily compels a lack of detail, a passing over of the various opinions on disputed questions. Constitutional, criminal, and institutional canon law, civil and criminal procedure, are all treated this way, by lectures which aim to present the whole subject systematically, and each part of it historically. More or less philosophical criticism prevails according to the particular ideas of each professor.

In addition to the lectures, not in their stead, *practica* and *seminars* are, especially of late, much recommended to the students. In the *seminars*, professor and student work together on original authorities. Sometimes a paper is read by one of the students, followed by discussion. In the nature of things but few men—at the most twenty—are admitted to the *seminars*. Their purpose is not to train a practical lawyer, but rather to guide the future professor into the work of original research. In the *practica*, cases are discussed by the professor. Instead of taking up Pandects systematically, he takes up real or supposed cases illustrative of some of the principles of Pandect law. He gives various possible opinions on the case,—sometimes he criticises the paper of one of the students.—and then develops his own views. Some professors allow class discussion, but this is not usual. *Reperitoria* and *conversatoria* are courses for the discussion of legal questions, not necessarily with the cases; often a title from Justinian's Digest forms the basis of the work. The practical training of the student is not intended to be given during his university course. For this reason he is compelled to give three years to practical work between the first and second State examinations.

It is generally said that many students waste their first two semesters entirely. This may be true at the smaller universities, but in Leipsig or Berlin, at least two-thirds of them attend lectures faithfully. Many do more than this; they are given a complete outline of the subject in the lecture, enough for the first examination, and few care for anything more. The exceptions to this rule are the men who take part in the *seminars* and *practica*, and who read as much of the *Corpus Juris* and the literature of the law as they can find time for.

Of moot courts and law trials they know nothing. During this university training the work to be done is purely theoretical. The professors seldom concern themselves with pointing out that the courts adopt a view in conflict with the systematic conclusions which they have drawn. The student will learn that later. Moreover, the rule of *stare decisis* does not prevail, and therefore the decisions are not of such great importance to the development of the law as they are in America.

If it be asked whether a course in Germany will be valuable to the American law student, taking an interest in law not only as a profession, but also as a science, the answer must undoubtedly be in the affirmative. If it be further asked, what is to be gained by such a course? perhaps the answer will be, contact with men of wonderful legal ability and untiring industry, knowledge of a system of law which has formed the basis on jurisprudence of most civilized States, and has had some influence,—perhaps the amount is underestimated,—at various periods on our law, acquaintance with a legal literature covering every branch of law, and treating every subject historically and philosophically, with an ingenuity, depth of thought, industry, and learning, nowhere surpassed, if indeed equalled.

J. W. M.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

MONEY PAID UNDER MISTAKE OF FACT. — DEFENCE OF PURCHASE FOR VALUE. — (*From Professor Keener's Lectures.*) — Where A, induced by mistake, intentionally pays money to B, the legal title passes to B, and the obligation, if any, which B is under, is the equitable obligation of restitution. That the legal title passes in such a case is evident if one considers the effect of the conveyance of land under mistake, the fact being that the grantor, though induced by mistake, did intend to convey the land in question to the grantee named. In this latter case no one would question that the legal title had passed, and that at most the grantor's only right was an equitable right of restitution. Yet consent and delivery is as effectual in passing the title to personalty as is the execution and delivery of a deed in the case of realty. Hence, in the case of money paid under mistake, as above supposed, the legal title has passed, and A can have nothing more than an equity. A having only an equity, B, if he is a purchaser for value without notice of A's equity, cannot be compelled to make restitution.¹

¹ *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397 (Sembler), s. c. 1 Keener, Cas. on Qu. Con. 443; *Sonhwick v. First Nat. Bank*, 84 N. Y. 420 (Sembler), s. c. 1 Keener, Cas. on Qu. Con. 319; *Toumans v. Edgerlon*, 16 Hun. 23 (Sembler), s. c. 1 Keener, Cas. on Qu. Con. 439. See, however, *Atty. Gen. v. Perry*, Comyns, 481, s. c. 1 Keener, Cas. on Qu. Con. 435.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — CONTRACTS — RATIFICATION AFTER REVOCATION OF OFFER. — An offer was withdrawn by the offeror, after an unauthorized acceptance by an agent of the offeree and before ratification by the principal. The so-called ratification followed. *Held*, that the revocation was inoperative, and that specific performance would be enforced against the offeror, the contract being in regard to the execution of a lease. *Bolton & Partners v. Lambert*, 37 Wk. Rep. 434 (Eng. Ct. of App.).

The agent in this case was a director of the plaintiff company, and it was conceded that he had no authority to accept the defendant's offer. The decision directly and obviously contravenes two elementary principles of the law of contracts and of agency. For, in the first place, there was no mutual assent between the parties. Clearly the plaintiff company was not bound by the unauthorized act of their agent until an acceptance by them of the defendant's offer; but before they accept the offer is withdrawn. The principle of agency, on the other hand, is, that, in order to make valid the unauthorized act of an agent, the principal must ratify at a time when he might do the act as an original act. This principle is illustrated by the cases of *Walter v. James*, L. R. 6 Ex. 124, and *Bird v. Brown*, 4, Ex. 786. The court, consisting of Cotton, Lindley, and Lopes, L. JJ., relieve themselves of the necessity of establishing a ratification by applying the familiar maxim in regard to its retrospective action: *Omnia ratihabitis retrotrahitur et mandato priori equiparatur*.

ALABAMA CLAIMS — WAR PREMIUMS — BANKRUPTCY — ASSIGNEE. — Money collected from the Court of Commissioners of Alabama Claims by an assignee, appointed after the payment of the premiums, but before the passing of the Act of 1882, *held* to belong to the bankrupt personally, as the claim for compensation did not, at the time of the bankruptcy, amount to an existing right to any description of property, and did not, therefore, pass under the assignment. The subsequent grant by the government, also *held* to be a voluntary act. *Kingsbury v. Mattock*, 17 Atl. Rep. 126 (Me.).

Similar decisions have been recently arrived at by various processes of reasoning, by the Supreme Courts of three other States. *Heard v. Sturgis*, 146 Mass. 545; *Taft v. Marsily*, 47 Hun, 175; and *Brooks v. Ahrens*, 68 Md. 212. The contrary view is taken by French, J., in "The Bankruptcy Question," March, 1884, in Rules and Opinions, etc., Court of Commrs. of Ala. Claims, and by Field, J., in a very carefully considered dissenting opinion in *Heard v. Sturgis*, *supra*.

BILLS AND NOTES — CONSIDERATION SPECIFIED IN NOTE — NOTICE. — A promissory note contained this statement; "Given for third payment on 28 lots in Rain's addition, ninth district, this day purchased of Albert Tavel." On a bill to compel the surrender of the note by defendant, a *bona fide* holder for value without notice, the consideration having failed, *held*, the specification of the consideration in the note is not sufficient to put an indorsee for value before maturity on notice as to the validity of the contract of sale. *Ferress v. Tavel*, 11 S. W. Rep. 93. (Tenn.).

The question presented in this case has never before been passed upon by the Supreme Court of Tennessee. The decision is in accord with the current of authority.

CONSTITUTIONAL LAW — AUTHORITY OF JUDICIARY OVER THE EXECUTIVE. — The Constitution and Code of Tennessee direct the governor to issue commissions to persons elected to Congress. *Held*, a court of chancery has no power to enjoin the governor from issuing a commission, or to compel him to deliver one already issued to complainant; the official action of the executive can neither be restrained nor coerced by the courts, and there is no distinction in this regard between official acts purely executive and those ministerial. *Bates v. Taylor, Governor*, 11 S. W. Rep. 266 (Tenn.). See *contra*, *Martin v. Ingham*, 17 Pac. Rep. 162 (Kan.), digested 2 Harv. L. Rev. 100.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW. — A statute which makes it the duty of a county treasurer, when any person neglects to procure a license

as required by law, "to seize any of the property upon which this statute creates a lien, . . . and sell the same to satisfy said license and costs," but makes no provision for giving notice to the owner of the property of its seizure and sale, deprives persons of their property without due process of law, and is unconstitutional. *Chauvin v. Valiton*, 20 Pac. Rep. 658 (Mont.).

CONTRACTS — CONSIDERATION — SUBSCRIPTION PAPERS. — Defendant's intestate signed a subscription paper by which, in consideration of the agreements of the other subscribers, he promised to pay a sum of money to the trustees of the plaintiff church. *Held*, that the mutual promises of the subscribers constituted no consideration for the promise of the decedent as between him and the plaintiff. If any action would lie at all, it would be one between the promisors for breach of contract. *Presbyterian Church v. Cooper, et als.*, 20 N. E. Rep. 352 (N. Y.).

CONTRACTS — ILLEGALITY — PUBLIC POLICY. — An extension company, which had a contract with a railroad company to locate and construct the road by the nearest, cheapest, and most suitable route between two points for \$20,000 per mile, agreed to locate the road through the town of A, in consideration of being paid a bonus by the defendant. In locating the road through A, it was necessary to deflect the same from the nearest, cheapest, and most natural route, five miles, at an additional cost of \$100,000. *Held*, that the contract between the extension company and defendant was against public policy, and void; for first, it was an agreement by an employee to violate his obligation to his employer; and, secondly, as the public had an interest in the proper construction of the railroad, it was an agreement to violate a duty which the extension company owed to the public. *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 9 Sup. Ct. Rep. 402.

CORPORATIONS — INTRA VIRES. — A resolution was passed at a meeting of proprietors of a bank, authorizing the directors to pay a half-yearly pension for five years, for the benefit of the family of a deceased officer. *Held*, that the court would not restrain the bank from paying the pension. *Henderson v. Bank of Australasia*, 40 Ch. D. 170 (Eng.).

DONATIO MORTIS CAUSA — DELIVERY. — A gift by a husband to his wife on the day of his death of a savings-bank book already in her possession is invalid. There must be an actual delivery of the book to constitute a valid gift. *Drew v. Hagerly*, 17 Atl. Rep. 63 (Me.).

DURESS. — By threatening to send a son to the penitentiary, for embezzlement, the mother was induced to give a mortgage. *Held*, the mortgage was void. *McCormick Harvesting Machine Co. v. Hamilton, et al.*, 41 N. W. Rep. 727 (Wis.).

There are only a few cases where a contract or conveyance has been avoided by duress to one's child. Duress to one's husband or wife seems to have been the limit of the older authorities. In *Harris v. Carmody*, 131 Mass. 51, a mortgage given by a father was avoided on account of duress to the son.

EQUITY — DISCOVERY IN AID OF PROCEEDINGS IN A FOREIGN COURT. — It is not the practice of chancery to give discovery in aid of proceedings in a foreign court. *Dreyfus v. The Peruvian Guano Co.*, 60 L. T. Rep. N. S. 216 (Eng.).

This case contains a careful review of English and American authorities. The contrary notion seems to have arisen from the uncertain notice of *Crowe v. Del Rio* (1769), in "Lord Redesdale's Treatise on Pleading," 186 n., an otherwise unreported case. *Bent v. Young* (1838), 9 Sim. 180, 186-7, and the opinion of Lord Hardwicke in the case of the *Earl of Derby v. Earl of Athol* (1749), 1 Ves. 202, are principally relied on in *Dreyfus v. The Peruvian Guano Co.*; in the former case, the Vice Chancellor says that *Crowe v. Del Rio* is no authority. Still, *Crowe v. Del Rio* was followed in *Mitchell v. Smith* (1828), 1 Paige, 287, and the same mistake seems to have been made by Judge Story in 2 Eq. Jur. § 1495, n. 2.

This case seems to settle the English law, and is probably correct on principle.

EQUITY — PHOTOGRAPHS — INJUNCTION TO RESTRAIN PUBLICATION. — A photographer who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such a purpose, and also on the ground that such sale or exhibition was a breach of confidence. *Pollard v. Photographic Co.*, 40 Ch. D. 345 (Eng.). The case was compared to those copyright cases where the owner of the chattel, as the receiver of a letter, is yet not allowed to multiply copies of it. See *Duke of Queensbury v. Shebbeare*, 2 Eden, 329. But the decision was not rested on that ground, as

the statutory requirement of registration had not been complied with by the plaintiff.

EVIDENCE — BEST EVIDENCE — VIEW.—On prosecution under Laws Wis. c. 214, sec. 4, for knowingly allowing a girl under twenty-one to resort to one's premises for purposes of prostitution, *held*, that the jury, having seen the girl, may take into account her personal appearance in determining whether the defendant knew she was under twenty-one; and that the testimony of the girl's mother is the best evidence of her age, a baptismal register kept by the mother being at best but hearsay evidence. *Herman v. Wisconsin*, 41 N.W. Rep. 171 (Wis.).

EVIDENCE — COMPETENCY OF WITNESSES.—Under Code Civil Proc., N. Y., § 829, prohibiting a party to, or person interested in, an action or proceeding from testifying in his own behalf against one claiming under a person deceased at the time of the trial, as to any personal transaction or communication had with the decedent, a legatee is incompetent to testify as to the circumstances preceding, attending, and following the execution of the will, such as the mental and physical condition of the testator, his acts, conversations, and conduct, from which sanity or the due execution of the will may be inferred, in a contest grounded on the alleged want of due execution and testamentary capacity. *In re Eysaman's Will*, 20 N. E. Rep. 613 (N. Y.).

LIBEL — PRIVILEGED COMMUNICATION — REPORT OF JUDICIAL PROCEEDINGS.—The publication of a judge's summing up to the jury may be the subject of an action for libel, if the statement is a partial inaccurate representation of the evidence. There is no presumption as to whether a judge's judgment is complete and accurate, but it is a fact for proof by evidence. *Dictum* by Lord Halsbury, L. C., and Lord Bramwell. *MacDougal v. Knight*, W'kly Notes (1889), 76 (House of Lords, April 8).

Same case in Court of Appeal, 17 Q. B. D. 636 (1886).

NEGLIGENCE — IMPUTED — PASSENGER ON STEAMBOAT — CONCURRING NEGLIGENCE.—By the concurring negligence of the officers of a steamboat, on which plaintiff's wife was a passenger, and the employees of defendant company, a collision occurred between the steamboat and an obstruction placed by defendant, without proper warning or signals, in the stream. In an action to recover for injuries caused to plaintiff's wife by the collision, *held*, as plaintiff's wife had no authority or control over the management of the boat, the negligence of the boat's officers could not be imputed to her; the boat's officers and defendants were joint tort-feasors, and plaintiff may bring an action against either of them, and recover, as if the whole injury had been caused by one alone. *Markham v. Houston Nav. Co.*, 11 S. W. Rep. 131 (Tex.).

Thorogood v. Bryan, 8 C. B. 115, has never been approved in Texas, nor has the doctrine of imputed negligence found favor there. As is known, this doctrine has recently received a severe shock in England by the decision of the House of Lords in the *Bernina* case, overruling *Thorogood v. Bryan*. See 2 Harv. L. Rev. 140 (note).

PERSONAL PROPERTY — TITLE — MIXING OF GRAIN BY WAREHOUSEMAN.—A warehouseman received plaintiff's grain for storage, giving receipts for it. Although there was no agreement allowing him to do so, in storing he mixed the grain in bins with his own grain, of the same kind and grade. From time to time he drew grain from the common mass, and added other grain to it, a quantity always being reserved greater than the amount stored by the plaintiff. Such reserved grain was of the same grade and quality, but not the same grain, which had been stored. The warehouseman made an assignment for the benefit of his creditors. *Held*, that the transaction of storage was a bailment; that the plaintiff's title was not extinguished or transferred to the warehouseman by mixing the plaintiff's grain with the other; and that, as the amount of grain reserved had always been sufficient to meet the plaintiff's demand, he could recover the quantity of grain which he had stored from the assignees of the warehouseman. *Odell v. Leyda et al.*, 20 N. E. Rep. 472 (Ohio).

PROPERTY — SEATS IN STOCK EXCHANGE.—A seat in a stock exchange is property, and liable for the owner's debts, though the by-laws of the exchange say that the property is held in trust for the members, and "no member, under any circumstances, shall be deemed to have any claim, or possess any individual right, title, or interest in the property or assets of the association" until finally dissolved. *Habenricht v. Lissak*, 20 Pac. Rep. 874 (Cal.). See also *Clute v. Loveland*, 9 Pac. Rep. 133.

REAL PROPERTY — COVENANT AGAINST INCUMBRANCES — EXISTING EASEMENTS.—A covenant against incumbrances is broken by the existence of an

easement over a portion of the land for the purpose of maintaining a dam, and it is immaterial that the grantee knew when the deed was made that the dam was so maintained. *Huyck v. Andrews*, 20 N. E. Rep. 581 (N. Y.).

The cases of *Kutz v. McCune*, 22 Wis. 628, and *Memmert v. McKeen*, 112 Pa. St. 315, were cited, but the court declined to follow their authority, deeming that "the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security."

REAL PROPERTY — DOWER — MERGER. — During coverture, the land of demandant's husband was sold at sheriff's sale. The purchaser afterwards conveyed the land to demandant, who, in turn, sold it to defendant, all of which took place during coverture. The wife brought this action after death of husband, in order to get dower in the land thus conveyed. *Held*, that when a married woman acquires during coverture the fee in her husband's lands, her inchoate right of dower ceases to exist. *Youmans v. Wagener et al.*, 9 S. E. Rep. 106 (S. C.).

The Chief Justice rested his decision on the analogy of merger: One of the concurring justices, on the ground of estoppel, namely, "that where one conveys an estate, with warranty, to which at the time he has no title, and subsequently acquires a good title, such title passes to the grantee through the estoppel raised by the warranty."

REAL PROPERTY — RESTRAINTS ON ALIENATION — POSTPONEMENT. — Bequest to trustees upon trust to pay to A "ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years." *Held*, that although the equitable interest of A was vested and absolute, yet he could not call upon the trustees for a payment of the legacy before the times fixed by the testator, the restriction as to the times of payment not contravening any rule of law or public policy. *Claffin v. Claffin*, 20 N. E. Rep. 454 (Mass.).

The court, in holding this limitation upon the *certain que trust's* absolute interest to be valid, follows logically the exceptional rule in regard to restraints upon alienation which it adopted in *Broadway Bank v. Adams*, 133 Mass. 170. For the contrary rule see Gray, Restraints on Alienation, §§ 104-112. The case is of special importance as tending to show that in Massachusetts, contrary to the general rule, a gift to a person absolutely, the payment of which is postponed until too remote a period, must be held to be void by the Rule against Perpetuities. See Gray, Rule against Perpetuities, § 120, note 1.

STATUTE OF LIMITATIONS — ADVERSE POSSESSION — MISTAKE. — Defendant was the owner of an enclosed cultivated piece of land; adjoining this land was a wild, unenclosed tract owned by the plaintiff's grantor; defendant leased all the land owned by plaintiff's grantor; afterwards plaintiff bought it; on a survey, it was found that the plaintiff's east line was within the enclosure, and over the boundary of the defendant's land. Ejectment for the strip lying between the mistaken east line and the real east line. *Held*, Statute of Limitations bars the action. The leasing to defendant does not prevent the running of the statute; if one by mistake encloses the land of another and claims it as his own to a certain fixed boundary, and keeps possession of it during the statutory period, he acquires a perfect title. *Sevy v. Yerga*, 41 N. W. Rep. 773 (Neb.).

TRUSTS — CONSTRUCTIVE TRUSTS. — Defendant conveyed to M. with covenant of warranty, etc., a one-sixth interest in certain land. At that time defendant had no title, but the owners of the legal title had orally agreed to convey to him a one-third interest. Subsequently defendant, for the purpose of defeating his deed to M., induced the owners of the legal title to convey the one-third interest to defendant's wife, who knew of the deed to M., and who gave no consideration for the conveyance to her. *Held*, that the transaction must be regarded in equity as if the owners had conveyed to defendant, and he to his wife, she holding in trust for M., and his heirs one-half of the interest conveyed to her. *Moore et al. v. Crawford et al.*, 9 Sup. Ct. Rep. 447.

WATER AND WATERCOURSES — CHANGE OF NATURAL FLOW. — An upper riparian owner who removes from the river-bed a natural ledge of rock, whereby damage is caused the lower tract by reason of the increased velocity of the stream, is liable in damages to the lower riparian owner. *Grant v. Kuglar*, 13 S. E. Rep. 878 (Ga.).

WILLS — LAPSED BEQUEST. — Testator bequeathed one-half of his residuary estate to J., or, if she be dead, to her executor. J. died during the lifetime of the testator, and bequeathed to the testator her residuary estate, which comprised the testator's devise to her. *Held*, that this one-half of the testator's residuary estate was undisposed of by the will. *In re Valdez's Trust*, 40 Ch. D. 159; s. c. 60 L. T. Rep. N. s. 42; cf. 5 L. Q. Rev. 223.

REVIEWS.

A TREATISE ON THE LAW OF BENEFIT SOCIETIES AND INCIDENTALLY OF LIFE INSURANCE. By Frederick H. Bacon. St. Louis, 1888. 8vo. Pages lxxxix and 761.

This book has the merit, that has a "scarcity value" in these present days, of dealing with a subject not hitherto discussed in a systematic treatise. The secret beneficiary societies that are in their nature both social clubs and life insurance companies have, indeed, as the author writes, "multiplied amazingly during the last twenty years," and have established branches in nearly every village in the land. They have given rise to many and important cases concerning the mutual duties of members, their liability for community debts, and the still more important questions relating to their rights as beneficiaries. No text-book has yet dealt with the first two classes of cases at all, nor with the last class, except in a very unsatisfactory manner, since there has been, hitherto, an almost complete failure in the existing authorities on life insurance, to distinguish between the rights of members of beneficiary societies and the holders of ordinary insurance policies. The exasperating confusion that has resulted makes especially valuable a treatise in which this distinction is clearly preserved throughout.

The book is a good one. It is full, clear, and accurate, and necessarily, in great part, new. The first four chapters, on the history and nature of beneficiary societies, will be found especially novel.

The citation of cases, especially as to beneficiary societies proper, is, apparently, exhaustive. The author also modestly states that "The work covers the entire subject of life insurance, and includes all cases decided up to date."

Copious citations are made from judicial decisions, a method of book-making, perhaps commendable when dealing with beneficiary societies, about which so little has been written, but, however, less justifiable in dealing with life insurance proper.

The book, while a clear and excellent statement of established law, contains little discussion of disputed questions, a deficiency sometimes to be regretted. Thus, for example, section 356, dealing with the effect of the non-payment of insurance premiums by reason of war, containing a correct and concise statement of the prevailing opinion on this subject, with full citation of authorities, *pro* and *con*, yet gives no discussion whatever of a point that has been much disputed and that goes to the very root of the question whether the payment of premiums is a condition precedent or condition subsequent.

A commendable practical feature is that, in general, references to cases are made not only to the regular reports, but also to the various systems of coöperative reports. The use of *supra* and *infra* is, unfortunately, still retained. The index is good. E. T. S.

A TREATISE ON THE LAW OF TRIALS. By Seymour D. Thompson, LL.D. In two volumes. Chicago: T. H. Flood & Co., 1889. 8vo. Pages clxxii and 2376.

These two volumes present exhaustively and systematically the whole of the law relating to the subject of trials. It is eminently a

practitioner's book, and as such, contains full precedents of instructions and quotations selected from the approved opinions of the courts. Necessarily much space is devoted to the consideration of the confused question of the relative provinces of the court and the jury. That question is discussed with reference to a great variety of cases in which it arises. For many, the value of the work would be increased had the size been diminished by condensing or excluding the general treatment of certain subjects, such as malicious prosecution and implied contracts, which are only indirectly related to the main purposes of the book, and for a full treatment of which one would naturally look to other treatises.

The work contains a satisfactory index and a full table of cases cited.
A. C. R.

A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS. By William A. Keener. Cambridge: Charles W. Sever, 1888. 8vo. 2 vols. Pages 541 and 658.

This collection of cases, designed especially for use in the Harvard Law School, is evidently the result of a careful and incisive search into the subject of quasi-contracts,—that branch of the law which is midway between contracts and torts, and which has hitherto received little systematic treatment. The term "quasi-contracts" is used to include all so-called "contracts implied in law." They are really not contracts at all, but are simply obligations imposed by law under certain circumstances. Without some guiding principles to determine when the law will impose such obligations, the decisions present merely a bewildering tangle of apparent inconsistencies. The logical application, however, of the simple doctrine that the law will not permit one man unjustly to enrich himself at another's expense, goes far to clear up the difficulties of a large class of cases. This doctrine of unjust enrichment is well illustrated by the cases selected. They deal with failure of consideration arising from mistake of law or fact, or from inability, in certain instances, to enforce a special contract; with benefits conferred with or without the request of the defendant; with duress, legal and equitable; and with waiver of tort.

It is to be hoped that the author will soon treat the subject further in the text-book promised in the preface.
E. I. S.

HARVARD LAW REVIEW.

VOL. III.

OCTOBER 15, 1889.

No. 3.

THE HISTORY OF THE REGISTER OF ORIGINAL WRITS.

DE Natura Brevium, Of the Nature of Writs,—such is the title of more than one well-known text-book of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of “original writs” is the very skeleton of the *Corpus Juris*. So thought our forefathers, and in the universe of our law-books, perhaps in the universe of all books, a unique place may be claimed for the *Registrum Brevium*,—the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form, when it gets into print, it is an organic book; three centuries before, it was an organic book. During these three centuries its size increased twenty-fold, thirty-fold, perhaps fifty-fold; but the new matter has not been just mechanically added to the old, it has been assimilated by the old; old and new became one.

It was first printed in Henry VIII.'s reign by William Rastell. Rastell's volume contained both the Register of Original Writs and the Register of Judicial Writs. The former is dated in 1531; at the end of the latter we find accurate tidings — “Thus endyth thys booke callyd the Register of the wryttes orygynall and judiciall, pryntyd at London by William Rastell, and finished the xxviii day of September in the yere of our lorde 1531 and in the xxiii yere of the rayne of our soverayn lord kyng Henry the

eyght." Whether this book was ever issued just as Rastell printed it I do not know; what I have seen is Rastell's book published with a title-page and tables of contents by R. Tottel, in 1553. In 1595 a new edition was published by Jane Yetsweist, and in 1687 another, which calls itself the fourth, was printed by the assigns of Richard and Edward Atkins, together with an Appendix of other writs in use in the Chancery and Theloall's Digest. In 1595 the publisher made a change in the first writ, substituting "Elizabetha Regina" for "Henricus Octavus Rex;" the publisher of 1687 was not at pains to change Elizabeth into James II. In other respects, so far as I can see from a cursory examination of Rastell's book (which I am not fortunate enough to possess), no changes were made; the editions of 1595 and 1687 are reproductions of the volume printed in 1531, and the correspondence between them is almost exactly, though not quite exactly, a correspondence of page for page.

Coke speaks of the Register as "the ancientist book of the law."¹ In no sense can we make this saying true. But to ask for its date would be like asking for the date of one of our great cathedrals. In age after age, bishop after bishop has left his mark upon the church; in age after age, chancellor after chancellor has left his mark upon the register. There is work of the twelfth century in it; there is work of the fifteenth century, perhaps of the sixteenth, in it. But even this comparison fails to put before us the full ineptitude of the question, What is the date of this book? No bishop, no architect, however ambitious, could transpose the various parts of the church when once they were built; he could not make the crypt into a triforium; but there was nothing to prevent a reforming chancellor from rearranging the existing writs on a new plan; from taking "Trespass" from the end of the book and thrusting it into the middle. No; to ask for the date of the Register is like asking for the date of English law.

When we take up the book for the first time we may, indeed, be inclined to say that it has no arrangement whatever, or that the principle of arrangement is the principle of pure caprice. But a little examination will convince us that there is more to be said. Every now and again we shall come across clear traces of methodic order, and probably in the end we shall be brought

¹ Preface to 9 Rep.

to some classification of the forces which have played upon the book. The following classification may be suggested: (1) Juristic logic; (2) practical convenience; (3) chronology; (4) mechanical chance. Let me explain what I mean. We might expect that the arrangement of such a work would be dictated by formal jurisprudence; we might expect that the main outlines would be those elementary contrasts of which every system of law must take notice, — real, personal — petitory, possessory — contract, tort. Again, knowing something of the English writs, we might expect to find those which begin with "*Præcipe*" falling into a class by themselves; or, again, to find that those which direct a summons are kept apart from those which direct an attachment; or, again, to find that writs of "*Justicies*," *i.e.*, writs directing the sheriff to do justice in the county court, are separated from writs destined to bring the defendant into the king's own courts. Well, in part we may be disappointed; but not altogether: formal jurisprudence has had something to do with the final result, though not so much as might be expected. The printed book begins, and every MS. that I have seen, whether it comes from Henry III.'s day or Henry VI.'s, begins with the writ of right. Now, there is logic in this; for whatever actions are "personal," whatever acts are "possessory," — and different ages hold different opinions about this matter, — there can be no doubt that the action begun by writ of right is "real" and "petitory" or "*droiturel*." Our Register then begins with the purest type of a real and *droiturel* action. And the logic of jurisprudence has left other marks, especially near the end of the book, where we find *Novel Disseisin*, *Mort d'Ancestor*, *Cosinage* and *Writs of Entry*, following each other, in what we shall probably call their "natural order." Still, such logic will not, by any means, explain the whole book. It would be quite safe to defy the student of "general jurisprudence" to find *Trespas*, or *Covenant*, or *Quare Impedit*, by the light of first principles.

Then, again, practical convenience has had its influence. The first twenty-nine folios of the printed Register are taken up by the Writ of Right, and other writs which have generally collected around that writ. Then a new section of the book begins (f. 30-71); it is devoted to writs which the modern jurist would describe as being of the most divers natures; but they all have this in common, that in some way or another they deal with

ecclesiastical affairs and the clerical organization. The link between this group and that which it immediately succeeds is (f. 29b) the Writ of Right of Advowson. It is a Writ of Right; but having once come across the advowson it is convenient to dispose of this matter once and for all, to introduce the Assize of Darrein Presentment, which is thus torn away from the other possessory assizes, the *Quare Impedit*, the *Quare Incumbavit*, the *Juris Utrum*, and so forth. This brings us into contact, if not conflict, with the church courts; so let us treat of Prohibitions to Court Christian, whether these relate to advowsons, land, or chattels, and while we are about it we may as well introduce the *De excommunicato capiendo*, and so forth; then we shall have done with ecclesiastical affairs. Here, to use the terms that I have ventured to suggest, we see "practical convenience" getting the better of "juristic logic;" or, to put it in other words, matter triumphing over form. But form's turn comes again. We have done with the church; what topic should we turn to next? The answer is, "Waste." But why waste, of all topics in the world? Because, until the making of a certain statute, duly noticed in our Register, the action of waste was an action on a royal prohibition against waste.¹ "Prohibition" is the link which joins "waste" to "ecclesiastical affairs."

Yet another principle has been at work. A section in the middle of the book is devoted to *Brevia de Statuto*, writs that are founded on comparatively modern statutes. What keeps this group of writs together is neither "form" nor "matter," but chronology; they are recent writs, for which neither logic nor convenience has found a more appropriate place. In short, we have here an appendix. But it is an appendix in the middle of the book. We can hardly explain its appearance there without glancing at the MSS.; but even without going so far we can still make a guess. When these statutory writs have been disposed of, we almost immediately (f. 196b) come upon what seems a well-marked chasm. Suddenly the Novel Disseisin is introduced, and then for a long while logic reigns, and we work our way through the possessory actions. If we find, as we may find, a MS. which has several blank leaves before the Novel Disseisin, which honors the Novel Disseisin with an unusual display of the illuminator's art, we have made some way towards a solution of the problem. At one time the book was in mechanically separate sections, and

¹ Stat. Westm. II., c. 14.

the end of one of these sections was a convenient place for a statutory appendix.

After all, however, it is improbable that we shall ever be able to explain in every case why a particular writ is found where it is found, and not elsewhere. The *vis inertiae* must be taken into account. Writs collected in the Chancery; now and again an enterprising Chancellor or Master might overhaul the Register, have it recopied, and in some small degree rearranged; but the spirit of a great official establishment, with plenty of routine work, is the spirit of leaving alone; the clerks knew where to find the writs; that was enough.

The MS. materials for the history of the Register are abundant. The Cambridge University Library possesses at least nineteen Registers, some complete, some fragmentary; the number at the British Museum is very large. Over the nineteen Cambridge Registers I have cast my eyes. They are of the most various dates. In speaking about their dates it is necessary to draw some distinctions. In the first place, of course, it is necessary to distinguish between the date of the MS. and the date of the Register that it contains, for sometimes it is plain that a comparatively modern hand has copied an ancient Register. In the second place, as already said, it is useless to ask the date of a Register, or of a particular Register, if thereby we mean to inquire for the date when the several writs contained in it were first issued, or first became current; the various writs were invented in different reigns, in different centuries. The sense that we must give to our inquiry is this: at some time or another the official Register of the Chancery was represented by the MS. now before us; what was that time? It will be seen, however, that the question in this form implies an assumption which we may not be entitled to make,—the assumption that our MS. fairly represents what at some particular moment of time was the official Chancery Register. I have as yet seen no MS. which on its face purported to be an official MS., or a MS. which belonged to the Chancellor or any of his subordinates. In very many cases the copy of the Register is bound up in a collection of statutes and treatises, the property of some lawyer or of some religious house. Often an abbey or priory had one big volume of English law, and in such volumes it is common to find a *Registrum Brevium*. Such volumes were lent by lawyer to lawyer, by abbey to abbey, for the purpose of being copied, and it is clear that

a copyist did not always conceive himself bound to reproduce with mechanical fidelity the work that lay upon his desk. Thus, many clerks are quite content that the names of imaginary plaintiffs and defendants should be represented by A and B, while another will make "John Beneyt" a party to every action, and suppose that all litigation relates to tenements at Knaresborough. We have not to deal with the dull uniformity of printed books; no two MSS. are exactly alike; every copyist puts something of himself into his work, even if it be only his own stupidity. Thus, settling dates is a difficult task. Sometimes, for example, a MS. which gives the Register in what, taken as a whole, seems a comparatively ancient form, will just at a few places betray a knowledge of comparatively modern statutes. Gradually, however, by comparing many MSS., we may be able to form some notion of the order in which, and the times at which, the various writs became recognized members of the *Corpus Brevium*.

It will be convenient to mention here that one of the most obvious tests of the age of a Register is to be found in the wording of those writs which expressly mention a term of limitation. There are three such writs; namely, the Novel Disseisin, the Mort d'Ancestor, and the *De nativo habendo*. Now, at the beginning of Henry III.'s reign (1216), the limiting period for the Novel Disseisin seems to have been the last return of King John from Ireland, but in 1229, or thereabouts, there was a change, and Henry's first coronation at Westminster became the appointed date;¹ the Mort d'Ancestor was limited to the time which had elapsed since Richard's coronation. The Statute of Merton (1236), or rather, as I think, an ordinance of 5th Feb., 1237, fixed Henry's voyage into Brittany as the period for the Novel Disseisin, and John's last return from Ireland as the period for the Mort d'Ancestor and *De Nativo*.² Statute of Westminster the First (1275, cap. 39) named for the Novel Disseisin Henry's first voyage into Gascony, for the Mort d'Ancestor and for the *De Nativo* Henry's

¹ This change I infer from the cases in Bracton's Note Book. On 18 July, 1822, a writ was sent to Ireland, fixing Richard's death as the period for the Mort d'Ancestor, in order to assimilate Irish to English law. See Sweetman's Calendar of Irish Documents p. 160.

² Bracton's Note Book, vol. i., p. 106; vol. iii., p. 230. Compare the Irish writ given in Statutes of the Realm, i., p. 4. The Statute of Merton in its printed form mentions not Brittany, but Gascony.

coronation.¹ As no further change was made until Henry VIII.'s day, this test is applicable only to the very earliest Registers. For Registers of the fourteenth century, however, we can use a somewhat similar criterion; when they mention Henry III., as they call him "pater noster," or "avus," or "proavus noster." But, good though such tests may be, they are by no means infallible. A man copying an already ancient Register might well be tempted to tamper with phrases that were obviously obsolete; and, again, we shall have cause to doubt whether even in the Chancery itself a new statute of limitations always sets the clerks on promptly overhauling their ancient books and making the necessary corrections; great is the force of official laziness. Still, these writs which mention periods of limitation are the parts of the Register which first attract the critic's eye.

But there is yet another difficulty. Are we justified in assuming that there always, or ever, was in the Chancery, some one document which bore the stamp of authority, and which was *the* Register for the time being? I doubt it. The absolutely accurate officialism to which we are accustomed in our own day is, to a large extent, the product of the printing press. The cursitors and masters of the mediæval Chancery had no printed books of precedents. It is highly probable that each of them had his MS. books; that these books were transmitted from master to master, from cursitor to cursitor, and that they differed much from each other in details.² To have prevented them from differing would have been a laborious and a needless task. This thought will be brought home to us by several passages in the printed book. In the first place, it is full of notes and queries: the writer expresses his doubts as to the best way of formulating this or that writ; he tells us what some think, what others think, what some do, and what others do; occasionally he speaks to us in the first person, says "credo" and "je croye," and even points out that this Register differs from other registers.³ It is in this way that we may

¹ As regards the Novel Disseisin the change, if any, was but nominal; the first "voyage into Gascony" of the Statute of 1275 was "the voyage to Brittany" of the ordinance of 1237. In 1230 Henry went to Brittany, and thence to Gascony.

² The "Cursitores," or "Clerici de cursu," were the clerks who issued the writs of course. The name of Cursitor street still marks the site of their ancient home. As to their duties, see Fleta, p. 78.

³ Thus, f. 3 b, "quaere comment le brief serra fait ou si le brief gyst;" f. 6 b, "quibusdam videtur quod debeat scribi in istis brevibus etc.;" f. 9, "sapientes et jurisperiti dicunt;"

explain the somewhat capricious selection of writs that the printed book presents. It naturally includes all the common forms that are in daily use; but it includes, also many forms of a highly specialized kind,—forms which set forth the facts of cases which have happened once, but are by no means likely to happen again. The Chancery undoubtedly had some power in itself to devise such "writs upon the special case;" not unfrequently it was ordered to make a writ suited to the very peculiar circumstances of a case which had been brought before the Council, or before the Parliament, just because none of the common writs would meet it.¹ Of such "*brevia formata*" we get a selection, but only a selection. Some are preserved because they will be useful as precedents, others, as it seems to me, because they are curiosities and not likely to form precedents.² In many quarters we see more signs of private enterprise than of official redaction. A considerable number of specially worded writs bear the name of Parning,—a number out of all proportion to the brief two years during which that famous common lawyer held the great seal. He had the good fortune, we may suppose, to have some industrious clerk for an admirer; his predecessors and successors were less lucky.³ I greatly doubt,

f. 10 b, "secundum quosdam . . . sed alii dicunt;" f. 16, "et est contra registrum;" f. 27 b, "secundum quosdam fiant duo brevia;" f. 29 b, "secundum quosdam;" f. 97 b, "Nota quod non debet dici in brevi predicto *specialem auctoritatem ad hoc habentium* prout in quibusdam registris invenitur;" f. 108 b, "Nota per Thomam de Newenham; tamen alii clerici de cursu contradicunt;" f. 120 b, "Tamen quaere . . . per plures sages dit est;" f. 121 b, "Les Maistres de la Chancerie ne voudrissent agreer a cest clause;" f. 133, "Nota quidam addunt in istis tribus brevibus, etc.;" f. 134 b, "Vide de breve Statutum W. 2. c. 14 pro ista materia quia hic male reportatur;" f. 183 b, "Nota secundum quosdam . . . et ideo quaere inde;" f. 172 b, "Je croye que son brief nest pas le pire;" f. 184 b, "Credo quod istud breve vacat;" f. 200, "Ascuns gents dirent— f. 208 b, "In breve de post disseisina non dicatur *tam de illis*, etc., secundum Escrick;" f. 243 b, "Mes le brief . . . est le meillour come cest register voet;" f. 269, "Ista clausula . . . non continetur in statuto sed additur per quosdam jurisperitos."

¹ The necessity for specialized writs is often noticed in the endorsements on petitions to Parliament; e.g., in those of 14 Edw. II., Ryley's *Placita*, p. 408, "Habeat breve novæ disseisinæ in suo casu;" p. 409, "Adeat Cancellarium et habeat ibi breve in suo casu;" p. 412, "Habeat breve de conspiratione formata [conformatum] in suo casu;" p. 423, "Habeat breve de conspiratione in Cancellaria in casu suo formandum;" p. 421, "Habeant brevia suis casibus conveniencia." So in the Register we find writs issued by order of the Council; e.g., f. 64, "per consilium;" f. 114, a writ founded on a Parliamentary petition; f. 124, "per consilium;" f. 125, "per consilium."

² F. 64 b, "Istud attachiamentum est notabile valde;" f. 224, "Nota quod istud breve sigillatum fuit et quassabile ut dicebatur pro veritate."

³ Parning appears on f. 13 b, 16 b, 35, 69, 99 b, 100 b, 132, 136; in some other cases, though he is not named, we can tell, from the date of the writ, that it belongs to his

then, whether we have in strictness a right to speak about *the* Register of a given period, as though there were some one document exclusively or preëminently entitled to that name; rather we should think of *the* Register as a type to which diverse registers belonging to diverse masters and clerks more or less accurately conformed. About common matters these manuscripts agreed; about rarities and curiosities there was difference, and room for difference. There was no great need for a perfectly stereotyped uniformity; the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights or secured the plaintiff a remedy; it still had to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful. It is clear, indeed, that the granting of specially worded writs was regarded as an important matter, which required grave counsel and consideration; the masters were consulted as a body; sometimes it would seem as though the opinion of the justices was taken before the writ issued.¹ A chancellor, a master, even a cursitor, cannot have liked to see his writs quashed; and, though writs were quashed very freely, as the Year Books witness, still, if I mistake not, it will be found that in most cases the fault lay rather with the plaintiff or his advisers than with the Chancery; he had got an inappropriate writ, but not one that was in any respect contrary to law. Any notion that the Chancery was a Romanizing institution, that the learning of the masters was the learning of civilians, is rudely repelled by the Register. Whatever academic training in Roman and canon law the masters may have had, they were English

chancellorship. He is the only Chancellor that appears prominently. A certain Herleston appears in three places, f. 49, 80 b, 261; f. 261, "*Hoc breve concessum fuit . . . per cancellarium Lescrop et W. de Herleston,*" — *i. e.* (as I understand it) this writ was granted by the Chancellor, G. le Scrope, the Chief Justice, and W. de Herleston; the date of this writ seems to be 19 Edward III. Herleston was a Master in Chancery under Edward III. So, again, one Thomas of Newenham gets mentioned as a maker of writs; he seems to have been a Master under Edward III. and Richard II.; apparently we owe to him a writ against a vendor of a blind horse, who warranted it sound; see f. 108, 108 b, 151 b.

¹ Reg. Brev. Orig. f. 78 b, "*Et les maistres W. de Aym. [Ayremine, Master of the Rolls ?] et autres*" expressed an opinion about a writ which does not commend itself to the annotator; f. 121 b, "*Les Maistres de la Chancerie ne voudrient agreer a cest clause;*" f. 131 b, "*Ceux brefs furent enseales per tants les sages de la chancerie, per assent des serjeants le Roy et autres sages asses*" [*Nota quod hoc verbum asses non est verbum Anglicum sed verbum Franciscum*]; f. 200, "*Istud breve fuit concessum de assensu W[illelmu]m de T[horpe] capitalis justiciarii et aliorum justiciorum de banco et clericorum de cancellaria.*"

lawyers, daily engaged in watching the development of English law in English courts, in reading the Year Books, and in "writing up" decisions in the margins of their Registers. Still, to return to my point, the granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment.

The Register of which I am speaking is the Register of Original Writs. The printed book contains also a Register of Judicial Writs. The difference between Original Writs and Judicial Writs is generally known. Roughly speaking, we may put it thus: An original writ is a writ whereby litigation is commenced; its type is a common writ of trespass or debt, whereby the sheriff is directed to compel the defendant to appear in court and answer the plaintiff; on the other hand, a judicial writ is a writ issued during the course of an action, either before or after judgment; thus, the re-summons of one already summoned, a *venire facias* for jurors, a *feri facias*, an *elegit*,—these may be taken as types of judicial writs. But, in strictness, we are hardly entitled to bring into our definitions any particularization of the character of the writs. The technical distinction seems to have been a simpler one: the original writ issues out of the Chancery, the judicial issues out of a Court of Law; we can say no more. It sometimes happens that the same writ can be obtained in the Chancery or in the Common Pleas; in term time one gets it from the court, in vacation one goes to the Chancery; such a writ will, therefore, have its place in both Registers, the Original and the Judicial.¹ And very many of the documents which find a place in the former cannot be described as writs originating litigation; they relate to litigation that has been already begun. A tenant in an action begun by writ of right puts himself on the grand assize while yet the action is in the court baron or county court; the writ summoning the electors of the grand assize will issue out of the Chancery, and we must look for it in the Register of Original Writs. The same Register contains numerous writs evoking litigation from the local courts,—writs of *pone*, *certiorari*, *recordari facias*, and so forth. But, further, the fully developed *Registrum Brevium Originalium* contains great masses of documents which neither originate nor evoke litigation,—pardons, protections, safe-conducts, licenses to elect bishops and abbots, orders for the election of coroners and verderers, letters

¹ Reg. Brev. Orig. f. 32, 69 b.

whereby the king presents a clerk, fiscal writs addressed to the Barons of the Exchequer, writs to escheators, and so forth, in rich abundance ; even letters to foreign princes, begging them to do justice to Englishmen, find a place in the collection.¹ Many of these formulas, it may be, were never known as *brevia originalia*, and some were not *brevia* at all ; still, it would be very difficult to say where the original writs left off, for a great deal of what we might call fiscal and administrative work was done under quasi-judicial forms, and by the use of quasi-judicial machinery. The Exchequer, according to our ideas, was half law court and half financial bureau. The collection of the revenue, the management of the king's demesnes and feudal rights, were carried on by means of writs, inquests, verdicts, very similar to those which determined the rights of litigants. And happy it may be for us that no stricter separation was made between ordinary law and administrative law. Our present point, however, must be merely that all this great mass of miscellaneous matter is collected into the Register of Original Writs, and thus gets mixed up with the formulas of ordinary litigation. The later the MS. of the Register the larger is the proportion which the administrative documents bear to the writs which originate or evoke litigation, and, as we shall see hereafter, the general scheme of the book had become fixed at a time when it was still chiefly made up of writs subserving the process of litigation between subject and subject.

These things premised, it may be allowed me to make a few remarks about the early history of the Register.

It is highly probable that so soon as our kings began to interfere habitually with the ordinary course of justice in the communal and feudal courts, and by means of writs to draw matters into their own court, the clerks of the chancery began to collect precedents of such writs, and it well may be that some of the formulas that they used were already of high antiquity.² But the careful reader of Mr. Bigelow's "Placita" will, as I think, be led to doubt whether before the reign of Henry II. there was anything that could fairly be called a *Registrum Brevium*, and the student of Maddox's Exchequer will be inclined to hold that there were no writs that could be obtained "as of course" (*de cursu*) by appli-

¹ Reg. Brev. Orig., f. 129

² Branner, Entstehung der Schwurgerichte, p. 78, compares the *breve de recto* with the Frankish *indictulus communitorius*.

cation to subordinate officials. Nothing was to be had for nothing; the price of writs was not fixed, and every writ was, in the terms of a later age, "a writ upon the special case." Before the end of Henry's reign there had been a great change, though the practice of selling royal aid (theoretically it was rather "aid" than "justice" that was sold) was by no means at an end. Already when Glanvill wrote there were many writs drawn up "in common form;" so drawn up, that is, as to cover whole classes of disputes. Let us follow him in his treatment of them. Not impossibly he took them up in the order in which they occurred in an already extant Chancery Register, and, as we shall see hereafter, the arrangement of the Register in much later times conforms, as regards some of its main outlines, to the arrangement of Glanvill's treatise.

In his first book he begins (cap. 6) with the *Præcipe quod reddat* for land, which he treats as the normal commencement of a petitory action. In the second book we have (cap. 8, 9) the writs of peace granted when a tenant has put himself on the grand assize; then (cap. 11) the writ summoning the electors of the grand assize, and (cap. 15) the writ summoning the recognitors. The third book, on warranty, does not give us any "original" writ. In the fourth book (cap. 2) occurs the Writ of Right of Advowson, the Writ (cap. 8) *Quo advocato se tenet in ecclesia*; a Prohibition (cap. 13) to ecclesiastical judges against meddling with a cause touching an advowson, and (cap. 14) a summons on breach of such a Prohibition. The fifth book, on serfage, gives us (cap. 2) the *De libertate probanda*. The sixth book turns to dower, and contains (cap. 5) the Writ of Right of Dower, a writ of *Pone* (cap. 7) for removing the case from the county court, the Writ (cap. 15) of Dower *unde nihil habet*, and the Writ (cap. 18) of Admeasurement of Dower. The seventh book, on inheritance or succession, has (cap. 7) the Writ *Quod stare facias rationalem divisam*, and (cap. 14) the writ to the Bishop, directing an inquiry into bastardy. In the eighth book comes (cap. 4) the Writ *de fine tenendo*, and several writs (cap. 6, 7, 10), *Quod recordari facias*, "evocatory writs" we may call them. In the ninth we have (cap. 5) the Writ *De homagio capiendo*, the Writ of Customs and Services (cap. 9), a writ against a tenant who has encroached upon his lord (cap. 12), and the Writ *De rationalibus divisis* (cap. 14.) The tenth book gives us the Writ of Debt (cap. 2), the Writ *De plegio*

acquietando (cap. 4), a writ for a mortgage creditor calling on the debtor to pay (cap. 7), a writ calling on the mortgagee to render up the land (cap. 9), a writ calling in the warrantor of a chattel (cap. 16). From the eleventh book we gather only a writ announcing the appointment of an attorney. In the twelfth book we come to the Writs of Rights, strictly so called (*brevia directo tenendo*), and a number of writs empowering the sheriff to do justice; namely, the *Ne injuste vexes* (cap. 10), the *De nativo habendo* (cap. 11), a Writ of Replevin (cap. 12, 15), a Writ of Admeasurement of Pasture (cap. 13), a *Quod permittat* for easements (cap. 14), a Writ *De rationalibus divisis* (cap. 16), a Writ *Quod facias tenere divisam* (cap. 17), a Writ of *Justicies* for the return of chattels unlawfully taken by a disseisor, and a few other miscellaneous writs, including a Prohibition to Court Christian against meddling with lay fee. In the thirteenth book come the possessory assizes. The fifteenth gives a hasty sketch of criminal business.

Glanvill's scheme of the law, or rather his scheme of royal justice, might, as it seems to me, be displayed by some such string of catchwords as the following: "Right" (*i. e.*, proprietary right in land), "Church," "Liberty," "Dower," "Inheritance" or "Succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now, some of the main lines of this "*legalis ordo*," if I may use that term, keep constantly reappearing in the later history of the Register. At all events, two poles are fixed, — the *terminus a quo*, the *terminus ad quem*; we are to begin with "Right;" to end with "Possession." The reappearance of this scheme in the Register of later days is the more remarkable, because Bracton did not adopt it; as is well known, he begins with "Possession," and ends with "Right." We may make a further remark, which will be of use to us hereafter. Glanvill's twelfth book is most miscellaneous, and at one point resolves itself into a string of writs, which are given without note or comment. The idea which keeps the book together is that of justice done, not by the King's court, but by lords and sheriffs, in pursuance of royal writs. Such a tie is likely to be broken in course of time. Thus, the "Writ of Right Patent," the writ commanding a lord to entertain a proprietary action, is likely to find its proper place by the side of the *Præcipe quod reddat*, especially when Magna Charta has sanctioned the rule that a *Præcipe* is only to be issued when the tenant holds

immediately of the king.¹ And so, again, the writs commanding the sheriff to do justice, writs of "*Justicies*," or "*Justifices*," will hardly be kept together by this bond; but in course of time, as the king's own court extends, its sphere will fall into various subordinate places; thus, for example, "Debt by Justicies in the county court" will become an appendix or a preface to "Debt in the Bench."

The arrangement of Glanvill's book is, however, sufficiently well known, and therefore, without further reflection upon it, I will pass on to describe the earliest *Registrum Brevium* that I have seen. Happily it is one to which we can affix a precise date, namely, the 10th of November, 1227. It is found in a MS. at the British Museum (Cotton, Julius D., II, f. 143 b), — a book that once belonged to the monks of St. Augustine's, Canterbury. It forms a schedule annexed to a writ of Henry III., bearing the date just given, and directed to the people of Ireland. That writ recites that the king desires that justice be done in Ireland according to the custom of his realm of England, and states that for this purpose he is sending a formulary of the writs of course (*formam brevium de cursu*), and wills that they be used in the cases to which they are applicable. The writ was issued at Canterbury, and to this fact we probably owe its lucky preservation in a Canterbury book. The Register that it gives is about forty years younger than Glanvill's treatise, and affords the means of measuring the growth of law during an important period, — the period of the Great Charter. I will briefly describe its contents.

It begins with three Writs of Right (1, 2, 3), and we learn that these writs can only be had "*sine dono*;" that is, without payment, when the land demanded is but half a knight's fee or less, or the service due from it does not exceed 100 shillings, or, being a burgage tenement, the rent or the value of the buildings does not exceed 40 shillings a year. Then follows (4) the *Præcipe in capite*. Then (5) the *Novel Disseisin*, the period of limitation being stated as "*post ultimam transfretacionem nostram de Hibernia in*

¹Originally a Writ of Right is so called, because it orders the feudal lord to do full right to the demandant, *plenum rectum tenere*; and in this sense, the *Præcipe quod reddat* is no Writ of Right. But when possessory actions have been established in the King's court, "right" is contrasted with "seisin," and all writs originating proprietary actions for land, including the *Præcipe in capite*, come to be known as Writs of Right. This has been remarked by Brunner, *Schwurgerichte*, p. 411.

Angliam;"¹ and as an appendix to this we have (6) the Novel Disseisin of Common, and (7) the Assize of Nuisance, with variations. Next comes (8) the Mort d'Ancestor; the period of limitation is said to be *postquam coronacionem H. patri nostris*.² Then come (9) the assize of Darrein Presentment, (10) Prohibition to the bishop against admitting a parson, (11) Writ ordering a bishop to disencumber the church when he has admitted a parson contrary to such Prohibition, (12) Mandamus to a bishop to admit a presentee, (13) Writ of Right of Advowson, (14) Prohibition to ecclesiastical judges, (15) Writ against ecclesiastical judges who have disobeyed the Prohibition. This ecclesiastical group being finished, we find next (16) the Writ of Peace for a tenant who has put himself on the grand assize, and (17) a writ for the election of the grand assize. And here we have an interesting note: "*Et notandum quod in hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent non audito illo verbo quod in aliis recognitionibus dicitur scilicet a se nescienter.*" Unless I am traducing the copyist, something must have gone wrong with these last words. They were French, but he took them for Latin. In the grand assize the recognitor must swear, in an unqualified way, that he will tell the truth; while in all other recognitions he may add "a son ascient;" that is, "according to his knowledge." A small group of writs relating to dower (18, 19, 20) come next. Then follows (21) the *Juris Utrum*, which, it is remarked, lies either for the clerk or for the layman.³ Next (22) comes the Attaint which can be brought against recognitors of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, but not against the recognitors of the Grand Assize. Then (23) we have an action on a fine, "*Præcipe A. quod teneat finem*," and (24) the action of *Warrantia Cartæ*. Writs of Entry are represented by but two specimens: the first is (25) Entry *ad terminum qui præterit*,

¹This must be a blunder; it should have been "*post ultimam transfretacionem patris nostri de Hibernia in Angliam.*"

²Here again there must have been some carelessness. The date referred to is the coronation of Henry II., the present king's grandfather. The mistake would seem to be due not to the monastic copyist, but to the Chancery clerk who drew up the document sent to Ireland, and was not careful to change into "avi" the "patris" which stood in a formula of John's reign, from which he was copying. See Sweetman's *Calendar of Irish Documents*, pp. 37, 160.

³This was a moot point in Bracton's day. Pateshull allowed the laymen the assize, but afterwards changed his mind. Bracton thinks this a change for the worse. Bract., l. 285 b.

the second (26) is *Cui in vita*. Then we find (27) *quod capiat homagium*, (28) writs for sending knights to view an essoinee, and (29) to hear a sick man appoint an attorney. On these follow (30) the *De nativo habendo*, (31) the *De libertate probanda*, (32) the *De rationabilibus divisis*, and (33) the *De superoneracione pasturæ*. We pass to criminal matters, and get (34) the writ to attach an appellee to answer for robbery, rape, or arson, with a note that in case of homicide the appellee is to be attached, not by gage and pledge, but by his body; as a sequel to this comes (35) the *De homine replegiando*. We return to civil matters, and find (36) the Writ of Services and Customs, and (37) the *Ne injuste vexes*. Then comes (38) Debt and Detinue. The only writ that falls under this head is a *Justicies*, and not, like Glanvill's Writ of Debt, a *Præcipe*; and there is this further difference, that the remarkable words, "*et unde queritur quod ipse ei injuste deforciat*," which occur in Glanvill's writ, and make it look so very like a Writ of Right, have disappeared. The supposed debt in the Irish Register is one of 20 shillings, and we have this important note: "In the same fashion a writ is made for a charter, '*quam ei commisit*,' or for a horse or for chattels to the value of 40 shillings, '*sine dono*' [*i. e.*, without any payment to the king], for if the debt or price exceeds 40 shillings the words must be added: '*accepta ab eo* [the plaintiff] *securitate de tertia parte de primis denariis ad opus Regis*.'" In Ireland, at all events, the king will only become a collector of debts for the modest commission of 33⅓ per cent.

To this succeeds (39) a Prohibition to ecclesiastical judges against dealing with lay fee, and (40) a writ to compel them to answer for breach of such a prohibition. Next occurs (41) a writ directing the sheriff not to suffer an infant to be impleaded, and (42) a *Recordari facias* applicable to a case in which a tenant has vouched an infant. Then we have (43) a *Justicies de plegio acquietando* for a debt of forty shillings or less; "*non habebit ultra xl. sol. sine dono*." Then comes (44) a writ forbidding the sheriff to distrain R., or permit him to be distrained, to render ten marks to N., for which he is neither principal debtor, nor pledge; but "this writ does not run in privileged cities, or where the debtor is the king's debtor." Another writ (45) forbids the sheriff to distrain R. for money promised to the king "for right or record," *i. e.*, for money promised in consideration of the king's aid in litigation, if, without his own default, he has not got what he stipulated for. Another writ (46)

forbids the sheriff to distrain a surety when the principal debtor can pay ; but this writ is not to be issued when the debt is one that is due to the king. Then (47) comes a writ of Mesne by way of *Fusticies*, and (48) the *De excommunicato capiendo*. Upon this follows (49) covenant "*si quis conventionem fecerit albi quam in curia domini Regis cum vicino suo qui eam infringere voluerit de aliqua terra vel tenemento ad terminum si exitus illius tenementi non excesserint per annum xl. solidos ;*" the writ is a *Fusticies* "*quod teneat conventionem.*" We have then (50) a Writ of Dower, and (51) a Writ of Waste against a dowager. Miscellaneous writs follow : (52) a *Venire facias* for an assize ; (53) a *Pone ad petitionem petentis* ; (54) a summons for a warrantor ; (55) a writ to inquire of the bishop touching the marriage of a woman claiming dower ; (56) a writ directing a view of the land demanded.

So ends the Irish Register, an important document. It brings out very forcibly the king's position as a vendor of justice, or rather, as we have said, of "aid." We must, as it seems to me, believe, until the contrary be shown, that we have here a fairly correct representation of the writs that were current in England in 1227 ; the writs that were "of course" and to be had at fixed prices ; but some may have been omitted as inapplicable to Ireland.

Before making further comments, let us turn to an English *Registrum*, which, so far as I can judge, must be of very nearly the same date as this Irish *Registrum*. It is found in a Cambridge MS. (Ii. vi. 13), and may, I think, be safely ascribed to the early years of Henry III.'s long reign ; for I can see no trace in it of the Statute of Merton. The book contains a copy of Glanvill's treatise, which is followed by a *Registrum*, and of this we will note the contents. I add references to Glanvill's treatise, and to the Irish Register ; the latter of these I will designate by the symbol "Hib." while the Cambridge MS., now under consideration, I shall hereafter refer to as CA.

1. Writ of right addressed "Roberto de Nevill;" with several variations. (Glanv. xii, 2 ; Hib. 1.)
2. Writ of right "*de rationabili parte.*" (Glanv. xii, 5.)
3. *Præcipe in capite.* (Glanv. i, 6 ; Hib. 4.)
4. *Pone* ; this will only be granted to a tenant "*aliqua ratione precisa vel de majori gratia.*" (Hib. 53.)
5. Writs of peace when tenant has put himself on grand assize. (Glanv. ii, 8, 9 ; Hib. 16.)

6. Writ summoning electors of grand assize, "*et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.*" (Glanv. ii, 11; Hib. 17.)
7. *De recordo et judicio habendo.*
8. *Procedendo* in writ of right.
9. Respite of writ of right so long as tenant is "*in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptum nostrum.*" Respites (Hib. 41) where a tenant or vouchee is an infant.
10. *Warrantia cartæ.* (Hib. 24.)
11. Entry "*ad terminum que preterit.*" (Cf. Glanv. x, 9; Hib. 25.)
12. Entry "*cui in vita.*" (Hib. 26.)
13. *De homagio capiendo.* (Glanv. ix, 5; Hib. 27.)
14. Novel disseisin;¹ limitation "*post ultimum reditum domini J. patris nostri de Hybernia in Angliam.*" (Glanv. xiii, 33; Hib. 5.)
15. Novel disseisin of pasture; same limitation. (Glanv. xiii, 37; Hib. 6.)
16. Mort d'Ancestor;² limitation "*post primam coronacionem R. Regis avunculi nostri.*" (Glanv. xiii, 3, 4; Hib. 8.)
17. *De nativo habendo*;³ same limitation. (Glanv. xii, 2; Hib. 30.)
18. *De libertate probanda.* (Glanv. v, 2; Hib. 31.)
19. *De rationabilibus divisis.* (Glanv. ix, 14; Hib. 32.)
20. *De superoneratione pasturæ.* (Hib. 33.)
21. Replevin. (Glanv. xii, 12, 15.)
22. *De pace regis infracta*; writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)
23. *De morte hominis*; writ to attach appellee by his body. (Hib. 34.)
24. *De homine replegiando.* (Hib. 35.)
25. Services and customs; a "*justicies.*" (Glanv. ix, 9; Hib. 36.)
26. *Ne injuste vexes.* (Glanv. xii, 10; Hib. 27.)
27. Debt; a "*justicies*;" "*reddat B. x. sol. quos ei debet ut dicit, vel cartam quam ei commisit custodiendam.*" (Glanv. x, 2; cf. xii, 18; Hib. 38.)
28. Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. xii, 21; Hib. 39.)
29. Similar prohibition to the litigant. (Glanv. xii, 22.)
30. Prohibition in case of debt or chattels, "*nisi sint de testamenti vel matrimonio.*"
31. Attachment for breach of prohibition. (Hib. 40.)

¹ I believe that this writ would have been antiquated after 1229.

² These writs seem older than 1237.

32. *De plegiis acquietandis*. (Glanv. x, 4; Hib. 43.) Also (32a) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)
33. *Mesne*. (Hib. 47.)
34. Aid to knight lord's son or marry his daughter.
35. *De excommunicato capiendo*. (Hib. 48.)
36. Covenant; *justicies*; "*de x. acres terre*." (Hib. 49.)
37. Writ announcing appointment of attorney.
38. Writ to send knights to hear sick man appoint attorney. (Hib. 29.)
39. Writ sending knights to view essoinee. (Hib. 28.)
40. *Darrein presentment*. (Glanv. xiii, 19; Hib. 9.)
41. Prohibition in case touching advowson. (Glanv. iv, 13; Hib. 14.)
42. Writ of right of advowson. (Glanv. iv, 2; Hib. 13.)
43. Writ to bishop for admission of presentee. (Hib. 12.)
44. *Quare incumbravit*. (Hib. 11.)
45. Attachment for breach of prohibition. (Glanv. iv, 14; Hib. 11.)
46. Dower "*unde nihil habet*." (Glanv. vi, 15; Hib. 18.)
47. Dower "*de assensu patris*." (Hib. 19.)
48. Dower in London.
49. *Furis utrum*. (Glanv. xiii, 24; Hib. 20.)
50. Attaint; the assize was taken "*apud Norwicum coram H. de Bargo, justiciario nostro*." ¹ (Hib. 22.)
51. *De fine tenendo*; the fine made "*tempore domini J. patris nostri*." (Glanv. viii, 6; Hib. 23.)
52. *Quare impedit*.
53. Writ of right of ward in socage.
54. Writ of right of ward in chivalry.
55. Assize of nuisance; vicontiel or "little" writ of nuisance; limitation "*post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam*." (Cf. Glanv. xiii, 35, 36; Hib. 7.)
56. *Ne vexes abbatem contra libertates*.
57. *Quod permittat* for estovers; a *justicies*.
58. *Quod faciat sectam ad hundridum vel molen dinum*.

Comment on these two Registers I must for a while postpone; I hope to be allowed to return to the subject on some future occasion.

F. W. Maitland.

CAMBRIDGE, ENG., 1889.

[To be continued.]

¹ This seems a reference to an eyre of 1222.

IS THE STATUTORY ACTION FOR INJURIES CAUSING DEATH TRANSITORY ?

THE question is one of jurisdiction ; but, of course, of jurisdiction of the subject-matter and not of the person of the defendant. The word "transitory" is here used in the sense of following the person of the defendant into any territory where he can be served with process so as to effectively give jurisdiction of the person ; so that the discussion involves only the power of a court to enforce this particular cause of action arising outside of the State creating the court, and the duty of this court, which is a matter distinct from its power, to determine the controversy according to some law other than its own. The exercise of the power, assuming it to exist, may, to some extent, depend upon considerations of comity ; and it may be conceded that statutes, as such, have no extra-territorial force, and that, ordinarily, statutes creating trusts can be enforced only within the State of their enactment. Yet where the exercise of such comity has been in certain cases so uniformly acquiesced in as to have the imperative force of law, excluding all discretion, it should be exercised in other cases logically involving the same principle, even to the extent of enforcing foreign statutory rights, and, at all events, where such rights are not opposed to the public policy of the State of the forum. The argument of inconvenience and unnecessary burden would apply to the enforcement of all causes of action arising out of the State, and may therefore be dismissed as insufficient.

It cannot be doubted that many actions — indeed, all common law actions — that are personal and not local, that is, that might have arisen anywhere, have become transitory. The liability attaches to the person, and follows wherever it goes. It can no longer be evaded by removing from one place to another. As to such actions, jurisdiction of the person includes jurisdiction of the subject-matter. But this proposition may involve a different principle when applied to a cause of action not recognized at common law, and purely the creature of a local statute. Thus, where a statute provides that whenever a person should be killed by the

wrongful act of another, which act, if death had not ensued, would have given the injured party a remedy, the party who would have been liable, if death had not ensued, shall be liable at the suit, say, of the personal representative of the deceased, for the exclusive benefit of the next of kin, it is more difficult to determine in what cases, if any, such an action should be held transitory.

It may be assumed that if the laws of the State where the injury was done and the death occurred afford no remedy, the courts of other States will not grant any, even though their statutes provide one, for similar injuries done in their own State. No instance has been found where an act done in one State, not actionable there, has been declared tortious by the courts of another State. Indeed, the authorities are expressly to the contrary. An act lawful in the place where it is done is lawful everywhere. "The true theory is, that no suit whatever respecting this injury could be sustained in the courts of this State, except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases, we administer the foreign law as from the proofs we find it to be, or as, without proofs, we presume it to be. . . . Acts done or neglects occurring there, if they are justified by the law of that State, are justified everywhere; and if these defendants are not liable there, they are not liable here."¹ The statute of the forum has no extra-territorial effect, and there is no presumption in favor of the existence of a similar statute in the State or country where the wrong was committed.²

The question under discussion may arise in three general classes of cases. First, where the statutes of the State of the forum, and those of the State where the injury was done, both provide a remedy, and are substantially similar. Secondly, where the statutes of the State of the forum give a different remedy, or a remedy to a different plaintiff, or for the benefit of different persons from the statutes of the State where the injury occurred. Thirdly, where the statutes of the State of the forum provide no

¹ *Whitford v. Panama R.R. Co.*, 23 N. Y. 465; *Needham v. Grand Trunk R.R. Co.*, 38 Vt. 295, *acc.*

² *Debevoise v. N. Y., L. E., & W. R.R. Co.*, 98 N. Y. 377; *Selma, R., & D. R.R. Co. v. Lacy*, 43 Ga. 461; *Allen v. Pitta, & Connellsville R.R. Co.*, 45 Md. 41.

remedy for similar injuries done in that State, and do not expressly give its courts jurisdiction over such injuries done in other States, which, by their statutes, make such injuries actionable.

In the first of these cases, that plausible argument, at least, does not apply, to the effect that interstate comity is not to be extended to cases calling for the enforcement of claims not recognized by the public policy of the State of the forum, or which are opposed to abstract justice or pure morals. The policy as declared by the respective statutes is the same, and the law of the State will not be pronounced unjust or immoral by its own courts. So that if these statutory actions are ever transitory, they must be so in this case. And yet the authorities, at all events in the principles which they declare, are confessedly conflicting, but perhaps not hopelessly so. The difficulty seems to arise from the fact that the recovery permitted by the statute is not deemed to be a part of the estate of the deceased, subject to his debts,¹ but a trust fund, to be collected by the personal representatives or other trustees, and distributed, differently in different cases, but generally for the benefit of the surviving husband or wife and next of kin.² The issue is well stated in *McCarthy v. Chicago, R. I., & P. Railway Co.*, 18 Kans. 46, where a plaintiff, qualifying as administrator in Kansas, sues in its courts for injuries done in Missouri, and resulting in the death of his intestate, the statutes of both States giving an action for such injuries, although giving the action to different plaintiffs. "The plaintiff is not amenable to the courts of Missouri; yet if this action is maintainable, the money is to be recovered here, upon the laws of another State, by a person acting in an administrative capacity under the authority of this State, and the fund is then to be distributed by the laws of the sister State." And the Massachusetts, Ohio, Indiana, Missouri, and Kentucky courts seem to agree that where the statute of the State where the injury was done gives the remedy to the personal representatives of the deceased, then no recovery can be had in another State having substantially the same statute, if the plaintiff receives his letters only from the courts of the latter State. And even this has been so held where the death occurred in the State of the forum, the injury having been done in the other State.³ The

¹ See *Perry v. St. Joseph & W. R.R. Co.*, 29 Kans. 420.

² *Davis v. N. Y. & N. E. R.R. Co.*, 143 Mass. 301.

³ *McCarthy v. Chicago, R. I., & P. R'way Co.*, *supra*.

reasoning of these courts is not uniform. In Indiana, where seduction has been made actionable by statute, jurisdiction was declined in a case where the seduction occurred in another State having a similar statute, and although the illicit intercourse was continued in Indiana. The reasoning of the court in this case, analogous as it is to the matter under discussion, may be used as a proper introduction to its consideration. Only common-law rights, says the court, "or such rights as are recognized as existing by the general usage of civilized nations," can be enforced by comity in a foreign forum.¹ This statement will probably be found too broad, even if it be not the general usage of civilized nations to grant compensation for wrongful acts causing death. Hardly more satisfactory is the reasoning in the leading Kentucky case, where, however, the jurisdiction was declined for what will probably be found to have been a sounder reason than the one stated by the court. "The Legislature of that State [Indiana] has no power to prescribe the duties of a personal representative appointed under the laws of another State, and it would be absurd to suppose that it intended to do so."² It does not seem very absurd to suppose that a Legislature would expect any one who accepted the benefits of its statute to submit to its burdens. The Massachusetts doctrine is thus stated by Judge Hoar: "If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another, in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts."³ The first of these reasons is perhaps open to the criticism that the statute under consideration had never been considered penal; and, further, that courts of one State do enforce statutes of other States which are distinctly penal, when the statutes of the two States are substantially similar. See the cases where double damages are given for the killing of cattle by railroads.⁴ As to the second of these reasons, it might be said that the "insuperable objection" has been successfully overcome in other

¹ *Buckles v. Ellers*, 72 Ind. 220.

² *Taylor v. Pa. Co.*, 78 Ky. 348.

³ *Richardson v. N. Y. Central R. R. Co.*, 98 Mass. 85.

⁴ *Boyce v. Wabash R'way Co.*, 63 Iowa, 70.

States. Finally, we have the Ohio case, which seems to have led the way on its side, and whose fallacy, if any, lies in assuming that if the personal representative be not appointed in the State where the injury was done, a distribution of the recovery cannot be enforced according to the foreign statute. "The jurisdiction of the court under which he [the administrator] acts does not extend to trusts to be carried out in pursuance of the laws of other States; for it may well happen that the next of kin, under the laws of Illinois, may not be the same persons, or take in the same proportion, as under the laws of Ohio. Certainly, to determine who are the *cestui que trusts*? the laws of Illinois must be regarded; and it is therefore the intention of the statute of that State, that the tribunal under which the personal representative in whom the right of action is vested, and upon whom the trust is imposed, is acting, should administer the trust and distribute the fund among the proper parties."¹ But cannot the foreign statutes of distribution be proved in the Ohio courts like any other fact? And cannot its administrator be compelled to distribute the recovery accordingly? It would seem to be a matter of inconvenience rather than lack of power.

The reasoning of these cases is distinctly rejected and departed from by the Federal, New York, Georgia, Iowa, Pennsylvania, and Minnesota courts of last resort. "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory or common-law right. A party legally liable in New Jersey cannot escape that liability by going to New York. It would be a very dangerous doctrine to establish that, in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. . . . The courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue

¹ *Woodard v. Michigan South, etc., R. R. Co.*, 10 O. St. 121.

of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute."¹ An answer to the objection so strenuously urged, that the recovery is not a part of the estate of the intestate, subject to his debts, apart from the fact that, as an objection to entertaining jurisdiction, its force is not very apparent, would seem to be that property frequently comes to the hands of personal representatives, such as subjects of specific bequests or of statutory exemption, that must go direct to legatees or the family of the deceased; and, as is said by Judge Miller in the Dennick case, "No reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit and impose on him the duty of distributing under that law."

The right of the personal representative appointed *in the State where the injury was done*, to recover in another State, whose statute gives a similar remedy, seems never to have been tested, and seems to be implied, or at least suggested, even by those courts which deny the right to the local administrator. "We do not pass upon the question whether an administrator appointed under the laws of another State having similar provisions of law to section 422 of our Code might or might not maintain an action of this character in this State for the purpose of recovering a fund to be distributed under the laws of the State from whence he derives his appointment."² "And we do not hesitate to believe that if another should qualify in Indiana as administrator of appellant's estate, and institute suit against the appellee on the same cause of action set up in this case, the courts of Indiana would promptly decide that the recovery here constituted no bar to that action."³

"The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this Commonwealth, in her representative capacity, is upon causes of action, which accrued to her intestate, or which grew out of his rights of property or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased, as

¹ Dennick v. R. R. Co., 103 U. S. 11. Leonard v. Columbia Co., 84 N. Y. 48; Morris v. R. R. Co., 65 Iowa, 727; Knight v. R. R. Co., 108 Pa. St. 250, *acc.*

² McCarthy v. Chicago, R. I., & P. R. R. Co., *supra*.

³ Taylor v. Pennsylvania Co., 78 Ky. 348.

trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased.”¹ “There are serious difficulties in allowing an Ohio administrator to undertake and discharge such a trust conferred by the laws of another State. It would be difficult to maintain that, without legislation, his oath or bond would extend to such a case.”²

We come now to the consideration of those cases where the statutes of the State where the injury is done give a different remedy, or a remedy to a different plaintiff, or for the benefit of different persons from the statutes of the State of the forum. The authorities furnish, as yet, but few illustrations, the most satisfactory discussion being found in a recent decision of the Supreme Court of Pennsylvania. The point decided was, that where the foreign statute gives the right to sue to the personal representative, even though for the benefit of the widow and next of kin, the widow as such cannot sue in Pennsylvania, although the Pennsylvania statute gives her the right to sue for injuries done in that State, resulting in the death of her husband. The principle approved by the federal courts is accepted and extended, not simply to make the foreign statute determine the cause of action, but also to identify the plaintiff.³ It must, of course, be true, as the court says, that “it would surely be pushing comity beyond its legitimate bounds to assume to do for the tribunals of New Jersey what they certainly would not do for themselves,—administer the right of one party through a suit brought by another.” The same conclusion was arrived at in *Limekiller v. Han. & St. Jos. R.R. Co.*, 33 Kans. 83; but it may be doubted if the court was sound on principle in its *dictum* to the effect that inasmuch as the statute of the forum gave a remedy for actions arising in its territory to a different plaintiff from the one named by the foreign statute, no recovery could be had in Kansas for injuries done in the other State. It is difficult to understand how the local statute can be construed into a prohibition of all

¹ *Richardson v. N. Y. Central*, *supra*.

² *Woodard v. Mich. Southern*, *supra*.

³ *Usher v. West Jersey R.R. Co.*, Pitts. Legal J'l, Vol. 19, 400.

actions, wherever they might arise, except where brought by the particular plaintiff, designated by the local statute for actions arising locally. And yet this construction was also adopted in *Vawter v. Mo. Pac.*, 84 Mo. 679, where it is held that this difference in the statutes makes them substantially dissimilar in import and character; and on this ground the Missouri court distinguishes the federal and the New York decisions. If it be true that the enforcement of rights, arising under foreign statutes, depends entirely upon comity, and that courts, for such reason, will not exercise jurisdiction, except in cases where the policy of the two countries is the same, although no question of abstract justice or pure morals be involved, we must expect to find incongruous results arrived at. Of course, statutes of different States are rarely identical. What divergence of form or substance, then, will exclude the judicial comity? We find, for instance, that the Missouri courts go to the extent of holding that a difference in the nominal plaintiff designated by the statute makes a difference in the public policy sufficient to preclude jurisdiction. On the other hand, the courts in Iowa hold that a statute in one State, limiting the recovery to \$5,000 for the benefit of the widow and the next of kin, is substantially similar to its own statute not limiting the recovery, and making it part of the personal estate of the deceased, although not subject to his debts.¹ Truly this seems a narrow and technical distinction, and the reasoning of Justice Miller in the *Dennick* case looks broader and sounder. When an act is done for which the law of the place says a liability shall ensue, the action being personal, and of the nature recognized as transitory, why should not the defendant be held liable in any court to whose jurisdiction he can be subjected by personal process? And carrying this simple and vigorous principle to its logical conclusion, why should not this liability be enforced in any State or country, even though the liability be statutory and irrespective of the policy of the forum, and independently of any corresponding local statute, there being nothing in the remedy to shock the local sense of justice or morality? This broad doctrine was well applied in the *Herrick* case, *infra*, where a Minnesota court enforced a liability arising in Iowa, under a statute making a railroad company liable to its employees for

¹ *Morris v. C., R.I., & P. R.R. Co.*, 65 Iowa, 727.

the negligence of fellow-servants, although the common law had not been changed in Minnesota.

And this brings us to a consideration of our third subdivision; that is, of the cases in which the common law has not been modified, in the State of the forum, on this subject of injuries causing death. It is certainly true that in actions *ex contractu*, no such distinction is made between rights arising under statutes and those existing by common law. There seems to be no doubt that the contractual obligations of stockholders and the charter obligations of incorporators are enforced in other States.¹ And although foreign penal statutes as such may not be enforced, yet where, as in statutes relating to gambling, they create a debt, the cause of action for the debt becomes transitory.² Why should not the same rule apply to such statutory actions, *ex delicto*, as are purely remedial, and intended to make compensation, in whole or in part, for a civil injury? As it is said in *Herrick v. Minn. & St. L. R.R. Co.*, 31 Minn. 11, "It by no means follows that because the statute of one State differs from the laws of another State, therefore it would be held contrary to the policy of the laws of the latter State. . . . To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens." It hardly seems defensible to hold that the question of public policy shall be deemed involved when it is proposed to enforce a cause of action arising under the statute of another State, as in the case under consideration, and that this principle shall not be deemed involved in actions involving the enforcement of contracts that would have been usurious if made in the State of the forum, although lawful by the *lex loci contractus*.³ In other words, it is scarcely consistent to enforce a contract that, because of a change of the common law,—that is, the enactment of usury statutes,—would have been illegal if made in the State of the forum, and yet to decline to recognize injuries causing death, although made actionable by statute, in the State where they occurred. Certainly the question of public

¹ See *Jessup v. Carnegie*, 80 N. Y. 441.

² *Flanagan v. Packard*, 41 Vt. 561.

³ See *Cutler v. Wright*, 22 N. Y. 472.

morals is more seriously involved in the former than in the latter case. So that, although there are no authorities to directly support such a proposition, it may fairly be contended that, where a statute, by way of compensation rather than as a penalty, allows a recovery for injuries causing death, that recovery should be enforceable by the party designated by the statute, in the courts of any State or country that can obtain jurisdiction of the person of the defendant.

Jesse W. Lilienthal.

NEW YORK, September, 1889.

THE DOCTRINE OF STARE DECISIS AS APPLIED TO DECISIONS OF CONSTITUTIONAL QUESTIONS.

THE doctrine of *stare decisis*, which is firmly imbedded in our law, has, like all general rules and doctrines, many limitations and qualifications. Not every decision is entitled to its application and protection. The following definition has been supposed to present the rule with the ordinary practical qualifications approved by our best law courts: "A deliberate or solemn decision of a court or judge, made after full argument on a question of law fairly arising in a case and necessary to its determination, is an authority or binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented; but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible."¹

Accepting this definition, our query is, whether the doctrine ought to be, or is, less strictly applied to decisions of constitutional questions than to questions of mere private right.

¹ Chamberlain's *Stare Decisis*, p. 19.

The second legal-tender decision of the United States Supreme Court—*Knox v. Parker* (12 Wall. 457), reversing the first decision of that court, *Hepburn v. Griswold* (8 Wall. 603)—called attention to this point. In the former case, Mr. Justice Strong, delivering the opinion of the court, says of the latter case (p. 554):—

That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard by a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right.¹ We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately; but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both judgments.

Mr. Justice Bradley, also, delivering a concurring opinion, says, (p. 569):—

Regarding the question of power as so important to the stability of the government, I cannot acquiesce in the decision of *Hepburn v. Griswold*. I cannot consent that the government should be deprived of one of its just powers by a decision made at the time and under the circumstances in which that decision was made. On a question relating to the power of the government, when I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity and acquiesced in by the majority of the court. Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision. . . . It should be remembered that this court

¹ *Briscoe v. Bank of Kentucky*, 8 Peters, 118.

at the very term in which, and within a few weeks after, the decision in *Hepburn v. Griswold*, was delivered, when the vacancies on the Bench were filled, determined to hear the question reargued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal.

In the dissenting opinion of Chief Justice Chase, he says (p. 572):—

A majority of the court, four to five, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three in pursuance of an opinion formed after repeated arguments, at successive terms, and after careful consideration. . . . And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. . . . The court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled, and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question.

Mr. Justice Field, also, delivering a dissenting opinion, says (p. 634):—

The judgment in *Hepburn v. Griswold* was reached only after repeated arguments were heard from able and eminent counsel, and after every point raised on either side had been the subject of extended deliberation. . . . It is not extravagant to say that no case has been decided by this court since its organization, in which the questions presented were more fully argued or more maturely considered. It was hoped that a judgment thus reached would not be lightly disturbed.

The late Mr. Justice Matthews, in a letter to the writer in 1885, in allusion to the writer's published essay on *Stare Decisis*, expressed regret that the essay had not considered the question of "the applicability, or the extent of the application, of the doctrine to constitutional questions." No intimation, however, was given of the distinguished jurist's opinion upon the point.

If the question be to any extent an open one, it is practically a grave and interesting one, and it may not be amiss to inquire

what grounds there may be, if any, differentiating constitutional questions from other questions in this regard.

Chief Justice Chase, in the legal-tender cases, speaks of the reversal there in 1871, as "unprecedented in the history of the court;" and Judge Field implies, if he does not assert, the same. Judge Strong, in the majority opinion, as above quoted, refers only, as authority, to *Briscoe v. Bank of Kentucky*. In that case, decided with *New York v. Milne*, in 1834, Chief Justice Marshall said :—

The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present (p. 121).

A reporter's note adds that "Mr. Justice Johnson and Mr. Justice Duvall were absent when these cases were argued." The court then consisted of seven members.

This authority is perfectly plain. The rule of practice stated is, that a majority of a full court—certainly nothing more—ought to join in deciding constitutional questions. A quorum of the Supreme Court has always been fixed by statute, and in 1834, was five. In ordinary cases, in distinction from constitutional cases, a majority of a quorum is sufficient for a decision. Judge Strong's remark, that, "we have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right," and his reference to *Briscoe v. Bank*, can only refer to the rule of practice requiring ordinarily the concurrence of a majority of a full court in the decision of constitutional cases. It can have no reference to the duty of the court to abide by decisions once made in accordance with this rule of practice, in cases involving constitutional questions.

The allusion made by Judge Strong, to the court then consisting of less than the members provided by law, is inaccurate. The case was decided November 27, 1869, and the act of April 10, 1869, raising the number of judges to nine, did not take effect, by its terms, until December 1, 1870.

Judge Bradley's remark above quoted, that "at the very term in which, and within a few weeks after, the decision in *Hepburn v. Griswold* was delivered, when the vacancies on the bench were filled, the court determined to hear the question reargued," and the conclusion he draws from this fact, that it "had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal," have reference, it is supposed, to the well-known rule of practice of the court of hearing cases reargued, under appropriate circumstances, where the motion for reargument is made at the same term in which the first decision was rendered. But it must be noticed, that no motion to reargue *Hepburn v. Griswold* was made or granted, but only a motion to "hear the question (*i. e.*, the legal-tender question) reargued." The case, therefore, was not within this rule of practice.

No other grounds of exception from the rule, in regard to the legal-tender cases or constitutional cases in general, are suggested in support of the action of the court in disregarding the doctrine of *stare decisis* on that occasion.

The exact facts of those cases ought to be borne in mind. When *Hepburn v. Griswold* was decided, the court consisted of eight members, — the youngest of whom, in service, had been a member sixteen years, — and all were present at the arguments and at the decision.¹ Five members of the court joined in the decision. Under the rule of practice, therefore, of *Briscoe v. Bank*, this decision was all, in point of regularity and authority, that the decision of any constitutional question or case could be.

Judge Bradley styles the decision in *Hepburn v. Griswold* "recent, made only by a bare majority, and during a period of public excitement, when the question had entered largely into the political discussions of the day." No doubt a decision gathers authority with age, and if it is to be reversed, it is less inconvenient to reverse it at an early date. But the date of a decision forms no element of the rule of *stare decisis*, so far as our reading goes. Five, it is true, are only a "bare" majority of eight, since four are not a majority of eight; but five are also a full and an absolute majority of eight. And in this connection, it should be remembered that the decision of the last legal-tender case was

¹ 12 Wall. 528, 572.

made by a "bare" majority of five to four! A majority less in ratio to the minority than in *Hepburn v. Griswold*.

Judge Bradley also remarks, as above seen, on the "public excitement" surrounding the question; but he could hardly have meant to seriously urge that such influences had disappeared between January, 1870, and May 1, 1871!

We add here, merely in the historical spirit, that no one will doubt that *Hepburn v. Griswold* was argued far more ably and fully, at least for the respondent, than was the same side in the later cases. Let one examine the reports on this point, if one doubts.¹

There is, then, nothing left of the reasons assigned for the disregard of *stare decisis* in the last legal-tender decisions except the idea, hinted, but not laid down, that constitutional cases may be exempted from the rule which governs in cases of private interest.

This brings us to the inquiry, whether there is or ought to be a different rule in the former cases?

The rule of *stare decisis* may be styled a rule of convenience, in the high sense of that word, — a rule which has been established in order to promote certainty and steadiness in the declaration and application of the law. There are no higher objects of the law or its administration. *Misera est servitus, ubi jus vagum aut incertum*. Without going far into the grounds of the rule, it may be compendiously said that it has found a firm lodgment in all well-developed or permanent systems of law, — Roman, French, Prussian, English, and American. It rests on an obvious sense of justice as well as of convenience. "Law, to be obeyed or followed, must be known; to be known it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths.

What is there to soften the rigor or abate the force of this rule as applied to the decisions of constitutional questions coming before courts? It will hardly be claimed that convenience does not call for certainty in constitutional law as loudly as in other matters or kinds of law. Judges Strong and Bradley dwell on the far-reaching public consequences of the decision of constitutional questions, especially of "questions of constitutional power." No

¹ 8 Wall. 603; 12 Wall. 457.

one questions it ; but it might seem that this consideration was one chief reason for holding steadily by such a decision made upon full argument, and careful consideration by a full court. We would admit all the considerations, all the qualifications, urged by these most accomplished and upright judges, — though we do not see how they applied to the legal-tender decisions of 1870, — but we cannot feel their force in constitutional questions so much even as in matters of private right.

Whether, however, it was right and wise to reverse the first legal tender decision or not, or whether that case was a fair exception to the rule or not, it would at first view appear to be more inconvenient for the whole people to be in doubt as to matters of constitutional construction, than for a comparatively few to be in doubt as to some point of commercial law, for example. A rule of constitutional construction can hardly be changed with less inconvenience or disadvantage to the public than one of private concern only.

It must be conceded always that if a decision is wrong, clearly wrong in principle or on the facts (and this is to be determined on the conscience of the court called to examine it), it may be, or even ought to be, reversed. No less, an exception to *stare decisis* seems tenable or practicable. This is as true, it seems in reason, of public cases as of private cases, of cases of constitutional law or power as of cases of private right, and no more so. Our inquiry now is, Is the rule less applicable in any respect to cases of the former class than to those of the latter ?

If the view here suggested is supported or opposed by any authorities or reasons, we do not know where, better than in the HARVARD LAW REVIEW, one may look for their discovery and presentation.

We know of no authorities which have discussed or answered our inquiry ; we do not even know that it is regarded in the forum of the profession or of jurists and judicious law-writers as an open question ; but the circumstances to which we have alluded above may, perhaps, have warranted our inquiry and our observations on it.

D. H. Chamberlain.

NEW YORK, April 29, 1889.

HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
CHARLES HUDSON, <i>Treasurer.</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
AARON THAYER,	EZRA R. THAYER,
WILLIAM G. THOMPSON.	

NOTICE TO THIRD-YEAR MEN.—The Harvard Law School Association offers a prize of one hundred dollars for the best essay on any of the following subjects:—

I. True meaning of the term “liberty” in the clauses in the Federal and State Constitutions which protect “life, liberty, and property,” considered (1) in point of principle, (2) on the adjudged cases.

II. The principle of liability in the case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, and the extent of its application in the law of torts.

III. Modifications in the view of crime and in the treatment of criminals, wrought by the advancement of science and civilization since 1750.

Competition for the prize is open to members of the third-year class only.

The essay must be sent to the Secretary of the Association, No. 220 Devonshire street, Boston, Mass., on or before March 1, 1890. The prize will be awarded at the meeting of the Association, which is to be held in Cambridge in June, 1890.

LOUIS D. BRANDEIS, *Secretary.*

THE following list shows the number of students in the Law School on October 10th. The right-hand column shows the number published in the catalogue of last year, that is about two months later than the present time.

October, 1889.		December, 1888.	
Third Year	51	Third Year	27
Second Year	60	Second Year	65
First Year	77	First Year	73
Special Students	56	Special Students	52
Total	244	Total	217

MR. EUGENE WAMBAUGH, A.B. 1876, LL.B. 1880, has been recently appointed a Professor in the Law Department of the State University of Iowa.

THE learned article by Professor Maitland which we print in this number is a contribution to legal learning of great value, and it is probably one which no other man could have written. Scholars are familiar with Professor Maitland's valuable and very readable communications in the "English Law Quarterly Review" within a few years. He has edited also in a thorough and admirable manner the two volumes of the Selden Society, as well as another volume of his own, presenting judicial records of the thirteenth century. And he has published at his own cost the invaluable series of early cases known as "Bracton's Note Book." For some years he was Reader of English Law at the English Cambridge, and later became, as he now is, the Downing Professor of English Law there.

"DOUBTLESS, there was a constant tendency to make seisin a matter of forms and ceremonies, of sacramental acts with rod or twig or hasp of door," says Professor Maitland in one of his articles.¹ Some recently published² extracts from early Connecticut records show in an interesting way that this tendency became crystallized into a solemn mummery, and was brought over to the colonies in the shape of a well-defined custom. East Hartford, for example, "voted that two of said committee shall go and enter upon said property and take possession thereof by Turf and Twigg, fence and enclose a piece of the same, break up and sow grain thereon within the enclosure, and that they do said service in right of all the proprietors, and take witness of their doings in writing, under the witness hands." Again, two inhabitants of Hartford testify, "as we were going from Hartford to Wethersfield, Jeremy Adams overtook us and desired that we would step aside and take notice of his giving possession of a parcell of land to Zachary Sandford, which we did, and it was a parcell of land on the road that goeth to Wethersfield, and we did see Jeremy Adams deliver by Turf and Twigg all the right, title and interest that he hath or ever hath of the whole parcell of land to Zachary Sandford."

Further, there existed in Massachusetts the custom of feoffment by livery of seisin in the first years of the colony. Professor Washburn says that it was formally done away by statute in 1642.³ Livery is said to have existed also in York, Me., until 1692,⁴ and it was possible in Pennsylvania until 1772.⁵ But it is to be noticed that the colonies did away with livery long before England herself did.⁶ In fact, there still remains in England one case where livery of seisin accompanying feoffment is effective without a deed.⁷

A MANAGER stole certain negotiable securities from his employers and sold them to X, who paid value and who was innocent of the fraud. Afterward the manager obtained by fraud from X a portion of the original bonds and some other bonds of a like kind and corresponding

¹ L. Q. Rev. 334, 335.

² Johns Hopkins University Studies, seventh series, vii. - ix. p. 41, n. 2.

³ Washburn, Real Property, *34, n.

⁴ Sullivan, Land Titles, p. 88.

⁵ Washburn, Real Prop. *34, n. 2.

⁶ 1845. Stat. 8 & 9 Vict. c. 106.

⁷ Williams, Seisin of the Freehold, p. 105.

value. These bonds were returned to the employers, who knew nothing of the whole transaction. Can X sue the employers and recover the bonds?

This is the case of *The London and County Banking Company v. The London and River Plate Bank*.¹

The question as a point of extreme legal nicety is an interesting and difficult one. "It is absolutely new, and must be decided on principle," remarks Lord Justice Lindley. The Court of Appeals holds that the defendants, *i. e.*, the employers, have given value for the bonds, and so can retain them. The value given is this: the defendants have lost a right to sue the manager for conversion by accepting from him the bonds in question. The right to sue for the conversion of the bonds has been exchanged for the bonds themselves. Acceptance of the bonds by the defendants is presumed, because "it would be contrary to human nature to suppose that the defendants would not have kept the bonds if they had known of their theft from themselves, and of their restoration; and we know as a fact that the defendants have insisted on their right to retain the bonds ever since they discovered the theft." There is the analogous doctrine that the acceptance of a gift is presumed,² even when the gift is of an onerous nature.³ This is the argument of Lord Justice Lindley. Lord Esher, M. R., seems to regard acceptance as immaterial, for he says: "When he restored them they lost their right, for how could they bring an action for the conversion of instruments which were in their own possession? I am of the opinion that the destruction of this right of action is a value moving from them, and that it is immaterial that they did not know what they were doing." No direct authority is cited by either Lord Justice.

The cases of *Thorndike v. Hunt*⁴ and *Taylor v. Blakelock*,⁵ however, both seem to support this doctrine. In the former case a trustee misappropriated part of one trust fund, and being called on to account and pay into court the amount of the trust, he fraudulently misapplied part of another trust fund to make good the deficiency; the court decides that the *cestuis* of the first trust estate can retain the proceeds of the second misapplication, because they have given value; *i. e.*, "There was a debt due from the trustees; they were called on to pay it, and if it had not been paid, they would have been liable to execution." The latter case is quite similar. One Carter was a trustee with the plaintiff under a will, and also trustee with the defendant under a settlement. Carter misappropriated part of the settlement fund, replacing, however, what he had taken by a corresponding portion of the will fund. Carter then died. It was held that the trust funds should not be disturbed; the defendant is a purchaser for value, because "in taking payment he relinquishes the right for the fruition of the right."

There seems to be no real distinction between the cases just cited and *The London and County Banking Co. v. The London and River Plate Bank*. The values, to be sure, given in the former cases are equitable *choses in action*, while the value given in the latter case is a legal right to sue for the tort. This, it is believed, is no reason for distinguishing the principles of the two decisions.

¹ L. R. 20 Q. B. D. 232, and L. R. 21 Q. B. D. 535; 61 L. T. Rep. N. S. 37.

² 3 Co. Rep. 252; 31 Ch. D. 282.

³ 3 De G. & J. 563 (1859).

⁴ 5 El. & Bl. 367, at p. 382.

⁵ L. R. 32 Ch. D. 566 (1886).

"It is," says Bacon, V. C., in *Taylor v. Blakelock*,¹ "one of those painful cases, in which, as between two innocent persons, a loss having been sustained, the court is to decide upon whom that loss shall fall." Why not let the loss lie where it falls?

The Supreme Court of Illinois has taken advantage of the summer vacation to fortify by a decision² the long-prevalent but erroneous notion that real estate remaining unsold at the dissolution or civil death of a corporation reverts to the original grantor or his heirs. This case seems a little strange, coming, as it does, three years after Professor Gray's "Rule against Perpetuities," although the error began with Lord Coke, and has been repeated times enough since to make it seem law.³ At all events, however, the court can enjoy the self-satisfaction of having brought forth the first offspring of this time-honored delusion. Not only is this case the first real decision for the opinion professed in it, but every authority cited in support of the conclusion is traceable directly or indirectly back to Co. Lit. 13b. Now Hargrave's note to this very passage shows that the other judges of the time were of a contrary opinion, while Professor Gray's analysis⁴ of Coke's authorities discloses a single *dictum* of Choke, J., as a lonesome justification for Coke's assertion. Moreover, constant efforts have been made to get away from the force of this erroneous doctrine. It is the law, for instance, that it applies to charitable corporations only. Again, it has been said that the doctrine applies to pure gifts and not to transfers on consideration.⁵ Furthermore, it is sometimes modified by statute.⁶

It had been hoped that this decision would never be arrived at when the case came up for judgment. And it is suspected that the case was not presented to the court by counsel in a very thorough manner. It is time that a notion so incorrect and so disturbing should be discounted in high places.

¹ L. R., 32 Ch. D. p. 565.

² *Mott v. Danville Seminary*, 21 N. E. Rep. 927 (15 June, 1889), digested in this number, p. 136.

³ Co. Lit. 13b, (1628); 1 Bl. Com. 434 (1765); 2 Kent, 307, 12th ed. (1873); 102 Ill. 315, 323 (1882); 19 Mo. App. 26, 31 (1885); 23 S. C. 297, 298 (1885); Angell and Ames on Corps. § 195, 11th ed. (1882); 2 Morawetz on Corps. § 1031, 2d ed. (1886); Gray on Perpetuities, § 51, n. 4 (1886).

⁴ Gray on Perpetuities, §§ 44-48.

⁵ 19 Mo. App. 26.

⁶ 18 Pick. 66; St. 189, c. 3.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

CHARITABLE CORPORATIONS — DISSOLUTION — REVERTER OF REALTY. — On the dissolution of a charitable corporation having no debts and no stockholders, the title to its land reverts to the original owner and does not escheat to the State. *Mott et al. v. Danville Seminary et al.*, 21 N. E. Rep. 927 (Ill.).

COMMON CARRIERS — CONTRACT RESTRICTING LIABILITY FOR NEGLIGENCE. — An express stipulation by any common carrier for hire, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469.

This case is interesting in that it reaffirms the doctrine of *Railroad Co. v. Lockwood*, 17 Wall. 357, and holds that it is applicable to all public carriers alike, — to those by sea as well as to those by land.

COMMON CARRIERS — REGULATIONS — QUESTION OF LAW. — The reasonableness of a rule prescribed by a railroad company for the government of its business is purely a question of law, to be decided by the court, and not a question of fact, to be passed upon by juries. *South Fla. R. Co. v. Rhoads*, 5 So. Rep. 633 (Fla.).

CONTRACTS — PUBLIC POLICY — HUSBAND AND WIFE. — An executory contract of a wife to support her husband, in consideration of a conveyance made by him to her, is contrary to public policy, and void. *Corcoran v. Corcoran*, 21 N. E. Rep. 468 (Ind.).

CONSTITUTIONAL LAW — CHINESE EXCLUSION ACT — TREATY RIGHTS. — Appellant on leaving the United States received a certificate, which, under the law as it then was, entitled him to return. The law was changed by the Exclusion Act of Oct. 1, 1888, in accordance with the provisions of which he was, on his return, refused permission to land. A writ of *habeas corpus* was sued out on the ground that the Exclusion Act was unconstitutional. *Held*, that it was a constitutional exercise of the legislative power, and that so far as it conflicted with existing treaties between the United States and China it operated to that extent to abrogate them as part of the municipal law of the United States; that the certificate of identity issued to appellant under the act of May 6, 1882, conferred upon him no right to return to the United States of which he could not be deprived by a subsequent act of Congress; and that the power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty which cannot be granted away or restrained on behalf of any one. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property capable of sale and transfer or other disposition, not such as are personal and untransferable in their nature. *Chae Chan Ping v. United States*, 130 U. S. 581, 9 Sup. Ct. Rep. 623.

For the decision of the same case in the Circuit Court, see *Chae Chan Ping v. United States*, 36 Fed. Rep. 431, digested 2 HARV. L. REV. 287.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — By an ordinance of the city of St. Louis, Mo., a tax of \$5 per year was imposed upon every telegraph-pole used in the city. *Held*, the tax cannot be upheld. "Telegraphs being instruments of interstate commerce, and defendant's lines in the city of St. Louis being used for transmission of messages to all parts of the United States, neither the State nor the city can impose a privilege or license tax upon the defendant." *City of St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59 (Mo.).

CONSTITUTIONAL LAW — LOCAL SELF-GOVERNMENT. — Act Ind., March 19, 1889, created a board of public works and affairs for cities of 50,000 inhabitants, to be appointed by the Legislature, and gave such board exclusive control of

streets, alleys, etc., and of the construction of sewers and the supply of water and lights. *Held*, that the law is unconstitutional as infringing the right of local self-government. *State ex rel. Jameson et al. v. Denny, Mayor, et al.*, 21 N. E. Rep. 252 (Ind.). For a decision of a contrary tendency, see *Com. v. Plaisted*, 148 Mass. 375, digested 2 HARV. L. REV. 288.

CRIMINAL LAW — BIGAMY — MENS REA. — The prisoner was convicted under 24 & 25 Vict. c. 100 s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that, at the time of the second marriage, she, in good faith and on reasonable grounds, believed her husband to be dead. *Held*, by Lord Coleridge, C. J., Hawkins, Stephen, Carr, Day, A. L. Smith, Willa, Grantham, and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a *bona fide* belief, on reasonable grounds, in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. *Reg. v. Tolson*, 23 Q. B. D. 168; s. c. 60 L. T. Rep. N. s. 899 (Crown Cases Reserved).

There was no argument before the court on behalf of the prosecution in this case, and the decision is, perhaps, on that account, entitled to less weight than it would otherwise deserve; but it is important, nevertheless, as showing that nine of the fourteen judges who sat considered that the *mens rea* was essential to the crime of bigamy, even under a statute the words of which seem to afford no sanction for the defence, which was here successful. For a decision substantially *contra*, see *Com. v. Mash*, 7 Met. 472.

CRIMINAL LAW — LIBEL — FORMER ACQUITTAL. — An acquittal for an indictment for libel, contained in a certain article published in a newspaper, is a bar to a subsequent prosecution for libel contained in the same article, although the defamatory words alleged are not the same. (McFarland, J., dissenting.) The majority of the court held that the criminal offence was the publication of the article which contained the alleged libels, and that this offence could not be split up and prosecuted in parts. The dissenting judge held that two libels might be published in the same paper, and that putting them under one headline or article made no difference. *People v. Stephens*, 21 Pac. Rep. 856 (Cal.).

CRIMINAL LAW — MURDER — MALICE. — The offence of murder in the first degree may be proved by the mere act of the killing and the attendant circumstances; the law will presume that the act of killing was malicious, if there are no circumstances to prevent the presumption. *State v. Brown*, 43 N. W. Rep. 69 (Minn.).

EVIDENCE — DECLARATIONS AGAINST INTEREST. — Where a wife, who, being thirty-nine years of age, had entered into an antenuptial agreement with her husband, he then being seventy years of age, whereby it was agreed that the wife, upon the death of her husband, should have absolutely one-seventh of all his estate in lieu of the one-third interest to which by law she would be entitled, and, also, that in case the husband should survive the wife, the same interest should, upon his death, descend to her heirs and personal representatives, wished, after the death of her husband, to show that the contract had been annulled, it was *held*, that a declaration of the deceased husband, made during his lifetime, to the effect that he had cancelled the contract was admissible as a declaration against his interest, for it was for his interest to retain the larger control of his property allowed by the contract. The provision of the contract in favor of heirs, does not negative this conclusion, for, on account of the disparity of their ages, it was probable that the wife would survive the husband. *Hosford v. Hosford*, 42 N. W. Rep. 1018 (Minn.).

EVIDENCE — FOREIGN LAW — PROOF. — If an expert witness called to prove foreign law states that any text-book, decision, code, or other legal document, truly represents that law, then the court may regard the legal document to which he refers not as evidence *per se*, but as part of the testimony of the witness, and may deal with it and give the same effect to it as to any other portion of the evidence of the expert. *Concha v. Muriatta*, 60 L. T. Rep. N. s. 798 (Eng.).

EVIDENCE — JUDICIAL NOTICE. — On a complaint for keeping open a shop on Sunday for the purpose of doing business therein, — *held*, that the court will take judicial notice that tobacco and cigars sold by a tobacconist are not drugs and medicines, and may exclude the testimony of a witness who offers to testify that they are. *Com. v. Marynski*, 21 N. E. Rep. 228 (Mass.).

EVIDENCE — PRIVILEGED COMMUNICATIONS. — An accomplice who confesses his connection with a crime, and goes on to the witness-stand, may be impeached by the testimony of an attorney to whom he has made communications. Though such communications are privileged, the privilege is that of the client and not that of the attorney, and the accomplice, by going on to the stand, leaves all privilege behind him. *People v. Gallagher*, 42 N. W. Rep. 1063 (Mich.).

FRAUD — EVIDENCE — MERCANTILE REPORTS. — "Where a merchant makes verbal statements as to his financial condition to an employe of a mercantile agency, by whom such statements are reduced to writing as a part of the same transaction, but not signed, and subsequently the merchant approves his former statements, the written statement," or the statements printed in the mercantile report, "are admissible in evidence against him." *Mooney et al. v. Davis et al.*, 42 N. W. Rep. 802 (Mich.).

INFANCY — VOIDABLE POWER OF SALE. — Where an infant gave to an attorney, as payment for the latter's services in defending the infant in a criminal action, a note and mortgage together with a *power of sale* — *held*, the power of sale was not void, but voidable, and subject to be defeated by the infant on payment of a just compensation for the services, within a reasonable time after his coming of age. *Askey et al. v. Williams*, 11 S. W. Rep. 1101 (Tex.).

INSURANCE — ASSIGNMENT OF POLICY. — If a life-insurance policy is made payable to the wife of the insured, or, if she dies in his lifetime, to her children, and she dies before the insured, the children are entitled to the proceeds, although the insured and his wife executed an assignment of the policy to another. *Appeal of Brown*, 17 Atl. Rep. 419 (Pa.).

JURY TRIAL — CHALLENGES — JUROR WITH OPINION AS TO GUILT OF ACCUSED. — A juror who says he has formed an opinion as to defendant's guilt, from what he has read in the newspapers, but also says he can render a verdict according to the evidence, uninfluenced by his previous opinion, is competent. *Rimolo v. Commonwealth*, 17 Atl. Rep. 520. (Pa.)

PLEADING — LEGAL EFFECT OF FACTS — EXEMPLARY AND ACTUAL DAMAGES. — Where, in an action for personal injuries, plaintiff set out all the facts necessary, to support a verdict for actual damages, and then prayed for "\$6 actual and \$2000 exemplary damages," — *held*, it made no difference that the sum called actual damages in the petition was so small, that, if there had been no other damages the court could not take jurisdiction of the case; since it is the legal effect of the facts set out, and not the name or effect stated by the pleader, that is important, and the jury, under the instructions of the court, were justified in finding that part or the whole of what the pleader called exemplary damages were, in fact, actual damages. *International & G. N. R. Co. v. Gordon*, 11 S. W. Rep. 1033 (Tex.).

PURCHASE FOR VALUE — SATISFACTION OF PRE-EXISTING DEBT. — Where a fraudulent vendee of goods transfers them to another in payment of a pre-existing debt, such pre-existing debt alone will not be a sufficient consideration to constitute a transferee a *bona-fide* purchaser for value. *Eaton v. Davidson*, 21 N. E. Rep. 442 (Ohio).

The court here attempts to distinguish transfer of negotiable paper from that of other property, and holds, it would seem inconsistently, that what is value in the former case is not in the latter. For a full collection of cases on the point, see Ames, Cases on Bills and Notes, Vol 1, pp. 650 and 667.

REAL PROPERTY — EASEMENTS — OBSTRUCTION OF — EQUITABLE RELIEF. — When the owner of a servient tenement obstructs a right of way of which the owner of the dominant tenement has made unjustifiable use, equity will not interfere, but will leave the owner of the dominant tenement to his action in law. *McBryde et al. v. Sayre et al.*, 5 So. Rep. 791 (Ala.).

REAL PROPERTY — LIS PENDENS — EFFECT OF SUBSEQUENT APPEAL. — A purchaser in good faith at a private sale, whose title rests on a voidable decree in chancery, the purchase being made after the entry of the decree, and before a writ of error thereto is sued out, is not affected by a subsequent reversal of the decree on error. A final decree, where no appeal is taken, is a final determination of the particular suit, and subsequent proceedings by a writ of error constitute a wholly new and independent action. Therefore, in this case, the purchaser did not take title *pendente lite*. *Cheever v. Minton et al.*, 21 Pac. Rep. 710 (Col.).

REAL PROPERTY — RULE AGAINST PERPETUITIES — CROWN GRANTS IN COLONIES. — In 1823, in a Crown grant of land in New South Wales, there was a reservation of a right to resume such quantity thereof, not exceeding ten acres, as might be required for public purposes. *Held*, that, whether or not the Crown in England would be affected by the rule against perpetuities, such rule was, nevertheless, inapplicable in 1823 to Crown grants of lands in the colony, or to reservations, or defeasances in such grants, to take effect on some contingency more or less remote, and only when necessary for the public good. *Cooper v. Stuart*, 14 App. Cas. 286 (Privy Council).

The reason given for making an exception to the rule against perpetuities in this case is, that in the early days of a colony it is impossible to foresee what land will ultimately be required for public uses; that some such reservation as was here employed is the only feasible way of protecting the future needs of the colony; and that a rule which rests upon considerations of public policy could not be said to be reasonably applied where its application would prevent such protection.

REAL PROPERTY — RULE AGAINST PERPETUITIES — POWER OF APPOINTMENT BY WILLS. — A was a *cestui que trust* for life, with a general power of appointment by will. She appointed by will two of her children for their lives, with remainders over. *Held*, that, as the power of appointment was by will only, the gift under it must be construed as of the time of the creation of the power, and not as of the time of its exercise. So considered, the gift, being an infringement of the law against perpetuities, is invalid. *Genet et al. v. Hunt et al.*, 21 N. E. Rep. 91 (N. Y.).

The Court here distinguished sharply between a general power of appointment by will and one by deed or will. In the latter case, the donor of the power is in effect the absolute owner of the property, as he can at any time appoint to himself. His appointment, then, is really a gift from himself to the appointee, and should be construed as of the time it is made. The donee of a general power of appointment by will is in no sense the absolute owner of the property, and there is, therefore, no reason for construing the gift under such a power as of the time of the exercise instead of the time of the creation of the power. The decision is in line with that of *Jamez v. C.*, in *In re Powell's Trusts*, 39 L. J. Ch. 188, and opposed to the later decisions of *Rous v. Jackson*, L. R. 29 Ch. D. 521, and *In re Flower*, 34 Wk. Rep. 149, in which the above distinction was not taken. See also *Gray*, Rule against Perpetuities, § 526, approving of the rule here adopted.

TELEGRAPH COMPANIES — RIGHTS OF RECEIVER OF A MESSAGE — REASONABLE REGULATION. — One to whom a telegram is sent may maintain an action against the telegraph company for its negligence in delivering the same. A telegraph company cannot stipulate that it shall not be liable for negligence in delivering a message unless a claim therefor in writing is presented within sixty days from the receipt of the message. This is not a reasonable business regulation, but a species of private statute of limitation. *W. U. Tel. Co. v. Longwill*, 21 Pac. Rep. 339 (N. M.).

TENANTS IN COMMON — SATISFACTION OF LIEN — CONTRIBUTION. — Where one tenant in common pays off a lien against the joint property, he is entitled to contribution from the other tenants to the extent of their respective interests, and a court of equity to secure such contribution will enforce upon the interests of the other tenants an equitable lien of the same character as that which has been removed. *Moon et al. v. Jennings et al.*, 20 N. E. Rep. 749 (Ind.).

WILLS — IMPERFECT DESIGNATION — EVIDENCE OF INTENTION. — A will bequeathed a sum to the "Nursery," without other designation. There was no corporation with that name, but there was one which was originally incorporated as the "Providence Nursery," and after seven years changed its name to the "R. I. C. Hospital and Nursery of P.," and subsequently consolidated with an orphanage, which was commonly called the "Nursery," and to which the testator had contributed. The orphanage maintained the "Nursery" in connection with its other work. *Held*, the claim of the orphanage is superior to that of another institution never popularly known as a nursery, though called by the testator the "Nigger Nursery;" and evidence that the testator, after making his will, said he had given a legacy to this latter institution, and when told that he had erroneously called it "Nursery," he replied that he did not wish to erase anything from the will, and that he meant the "Nigger Nursery," is inadmissible. *Wood et al. v. Hammond et al.*, 17 Atl. Rep. 324 (R. I.).

REVIEWS.

A **DICTIONARY OF LAW.** Comprising a dictionary and compendium of American and English jurisprudence. By William C. Anderson, of the Pennsylvania Bar. T. H. Flood & Company. Chicago, 1889. 8vo. pp. 1132.

The distinguishing feature of this dictionary is the material out of which it is constructed; judicial definitions and interpretations make up the body of the work. The dictionary itself is divided by different-sized type into definitions and commentary. "The endeavor has been to find definitions framed by the courts, the highest tribunals of the country receiving the preference. Some by text-writers are also given." "The commentary portion of the work consists of matters pertaining, it is believed, to every recognized branch of the law, and sets forth the reasoning of the law itself." "In the selection of cases preference is given upon all subjects to the decisions of the Supreme Court and circuit courts of the United States, and, next, to those of the highest courts of the States."

The merits and demerits of the plan of the work are apparent. Scholarly treatment can hardly be expected. Moreover, it is by no means clear that the sources which the compiler has preferred are the best for the purpose of true definition and discriminating application. Again, eleven hundred pages are hardly sufficient for an extensive commentary on the whole law. But, on the other hand, the dictionary exposes the law as it is applied every day in the highest courts of this country, and thus becomes distinctly American. It is practical and thoroughly useful, it seems, to the student and to the American lawyer.

It is impossible to tell as yet how well Mr. Anderson has performed the task he has set for himself. It seems to the writer, however, that notwithstanding the labor involved the work has been done extremely well.

L. F. H.

THE POWERS AND DUTIES OF POLICE OFFICERS AND CORONERS. By R. H. Vickers. Chicago: T. H. Flood & Co., 1889. 16mo. pp. 275.

The primary object of this book is to put, in language comprehensible to the general public, the broad principles of the law of police officers and coroners. The author, however, wishes to raise a strong public sentiment against the system by which the police of Chicago are controlled, which, he claims, enables the ward bosses to paralyze all efforts to bring certain classes of criminals to justice. This gives the book a strong local flavor.

A. C. T.

HARVARD LAW REVIEW.

VOL. III.

NOVEMBER 15, 1889.

No. 4.

PRESUMPTIONS AND THE LAW OF EVIDENCE.

IF the nature and the place in our law of what are called "presumptions" could be truly and exactly stated, it would contribute greatly to clearness in legal thinking; and especially it would help to a right apprehension of our law of evidence. When a learned Italian began a treatise upon Presumptions three hundred years ago, he opened with these words: "*Materia quam aggressuri sumus valde utilis est et quotidiana in practica; sed confusa, inextricabilis fere.*" And these words of Alciatus were put by Mr. Best, in 1844, upon the title-page of his early treatise on Presumptions. Without entering now upon any detailed consideration of the mass of legal presumptions, a herculean task and an unprofitable one, it may be possible to point out what I have just spoken of as the nature and the place of this topic in our law.¹

¹ The best consideration of the subject of presumptions which is known to me is found in an article in 6 Law Mag. 348 (Oct., 1831). The author dismisses from the subject of evidence what are called "presumptions of fact," and also absolute "presumptions of law;" but, erroneously, as I think, he regards disputable presumptions of law as a very important part of the law of evidence. J. F. Stephen, now Mr. Justice Stephen, long ago (in 1876) remarked of presumptions, that they appeared to him "to belong to different branches of the substantive law, and to be unintelligible, except in connection with them." (Introduction to Digest of Evidence, p. xv, Chase's ed.) He had said something similar in his Introduction to the Indian Evidence Act, in 1872. But he still retained in his books on evidence a number of presumptions, and he gave in Article One of his Digest this definition of the term: "'A presumption' means a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." He

I. Let us define the relation of presumptions to what we call the "law of evidence." They are ordinarily regarded as belonging peculiarly to that part of the law. This appears to be an error; they belong rather to the much larger topic of legal reasoning in its application to particular subjects; and this is indicated in the last clause of the passage from Alciatus just referred to, when he goes on to say, "*communisque est et jurisconsultoribus et rhetoribus in genere judiciali.*" This discrimination between reasoning and "evidence," as this word is used when we speak of "the law of evidence," is often overlooked,¹ but it is of great importance. There is no law for reasoning other than what is found in the "laws of thought;" but we do have, in our inherited system of municipal law, what is peculiar to English-speaking people, — a law of evidence. In its main features it is unknown upon the continent of Europe; it developed in England because they had the jury in England, or rather because in England they did not give up the jury. On the Continent they had the jury seven and eight hundred years ago, but they lost it.²

Now, what is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact, and, for the most part, with investigations where there is a dispute. These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact, in courts of justice. But they do not regulate the process of reasoning and argument. This

allowed a place in the law of evidence to "those [presumptions] which relate to facts merely as facts, and apart from the particular rights which they constitute." He seems to me, here and elsewhere, to have left the subject still in confusion, by not discriminating between rules of reasoning and the law of evidence. The law has no mandamus to the logical faculty; it does not direct an inference. That expression, however, is a very familiar one; see *e. g.*, Best, *Ev.*, s. 304.

¹ As by Greenleaf in the opening sentence of his valuable treatise: "The word 'evidence,' in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." This is corrected by Taylor in the first sentence of his book, thus: "The word 'evidence,' considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."

² And so Sir Henry Maine: "Mr. Maine said that the English law of evidence would probably never have come into existence but for one peculiarity of the English judicial administration, — the separation of the judge of law from the judge of fact, of the judge from the jury. Proceedings of the [Indian] Legislative Council of 12th December, 1868." I find this remark in Field's *Law of Evidence in British India*, p. 23, note. Maine was the predecessor of Stephen as legal member of the Legislative Council, and endeavored, unsuccessfully, to carry through an evidence act.

may go on after all the "evidence" is in, or when all the facts are admitted except such as are deducible by reasoning from these admitted facts. This process is in its nature the same which goes forward on questions of law upon a demurrer, — mere reasoning. But when one offers "evidence," in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact ; as when I offer the testimony of A. to prove the fact in issue, — for even direct testimony, to be believed or disbelieved, according as we trust the witness, is but a basis of inference, — or to prove an evidential fact from which, by a process of reasoning, the fact in issue may be made out ; and as when I present to the senses of the tribunal a visible object which may furnish a ground of inference. In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis ; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence.¹

Evidence, then, is any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact. And the law of evidence is the law which has to do with the furnishing of this matter of fact. But how "has to do" ? (1) It prescribes the manner of presenting evidence ; as by requiring that it shall be given in open court by one who personally knows the thing to be true, appearing in person, subject to cross-examination ; or allowing it to be given by deposition, taken in such and such a way ; and the like ; (2) it fixes the qualifications and the privilege of witnesses, and the mode of examining them ; (3) and chiefly,

¹ Stephen's limitation of the term "evidence" to (1) the statements of witnesses and (2) documents, seems too narrow. When in a controversy between a tailor and his customer, involving the fit of a coat, the customer puts on the coat and wears it during the trial ; as in *Brown v. Foster*, 113 Mass., at p. 137, a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written ; and it seems impossible to deny to this the name of "evidence." It is what Bentham called "real evidence," — a valuable discrimination when it is limited to that which is presented directly to the senses of the tribunal. But it appears to have little legal importance, when divided further into "reported real evidence," etc. Best, in his treatise, has confused this topic by following Bentham into this sort of refinement, overlooking, probably, for the moment, the fact that Bentham, unlike himself, was engaged in a general philosophical discussion, and was not writing a law book.

it determines, as among probative matters, — that is to say, as among things which are logically and in their nature evidential, — what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence.

Let me at this point speak of one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical systems; viz., that nothing which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers; just as a vast multitude of other things are assumed as already sufficiently known.

And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence; viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition. In a historical sense it has not been the fundamental rule to which the different exclusions were exceptions. What has, as matter of actual fact, taken place is the exclusion by the judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules. As, *e. g.*, in the case of hearsay, the affirmative rule is that which excludes hearsay;¹ and it is laid down that this applies in a new case, unless it can be brought within an admitted exception.

¹ And so Lord Blackburn, at the end of his opinion in the important case of *Sturlaw, Freccia*, 5 App. Cases, 623: "I base my judgment on this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." The point that is made in the text would lead rather to giving scope to what we call the exceptions to hearsay and restricting the rule of exclusion.

And yet, while this is historically true, the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind. If the doing of this shall require a restatement of some material parts of the law of evidence, that, perhaps, will only turn out as it should.

In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection, real or supposed, is the only test of admissibility; for so we should drop out of sight the chief part of the law of evidence. When we have said (1) that, without any exception, nothing which is not supposed to be logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible, it is obvious that, in reality, there is another test of admissibility than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, and likely to be misused or overestimated by a jury; others, as being impolitic, *e.g.*, unsafe for the State; others, on the bare ground of precedent. It is this sort of thing, as I said before, — the rejection of what is really probative, on one or another practical ground, — which is the characteristic thing in the law of evidence, marking, as it does, the influence of the jury system which gave rise to it.¹

¹ It is here that Mr. Justice Stephen's treatment of the law of evidence is perplexing; indeed, it comes to have the aspect of a *tour de force*. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter, and by the undertaking to put the rules of evidence merely in terms of relevancy. (It is to be observed that by relevancy he always means logical relevancy; the common but uninformative distinction between legal and logical relevancy is not made by him.) But it is impossible thus to take the kingdom of heaven by storm; one who would state the law of evidence truly must allow himself to grow intimately acquainted with the working of the jury system and its long history. In the Introduction to the Digest of Evidence (Chase's edition) xi-xii, the author says: "The great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue, and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of, and gives unity to, all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, 'What is this evidence which you tell me hearsay is not?' The expression 'hearsay is not evidence' seemed to assume that I knew, by the light of nature, what evidence was; but I perceived at last that that was just what I did not know. I found that I was in a position of a person who, having never seen a cat, is instructed about them in this fashion: 'Lions are not cats in one sense of the word, nor are tigers nor leopards, though you might be inclined to think they were.' Show me a cat, to begin with, and I at once understand what is meant by saying that the lion is not a cat, and why it is possible

The law of evidence is the creature of experience rather than logic, and we cannot escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that

to call him one. Tell me what evidence is, and I shall be able to understand why you say this and that class of facts are not evidence. The question, 'What is evidence?' gradually disclosed the ambiguity of the word. To describe a matter of fact as 'evidence' in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the word mean? The only possible answer is: it means that the one fact either is, or else is not, considered by the person using the expression to furnish a premise or part of a premise from which the existence of the other is a necessary or probable inference,—in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that judicial evidence is only one case of the general problem of science, namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill. Bentham and some other writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my 'Introduction to the Indian Evidence Act' to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law. The law has been worked out by degrees by many generations of judges who perceived, more or less distinctly, the principles upon which it ought to be founded. The rules established by them no doubt treat as relevant some facts, which cannot be said to be so. More frequently they treat as irrelevant, facts which are really relevant; but, exceptions excepted, all their rules are reducible to the principle that facts in issue, or relevant to the issue, and no others, may be proved."

It is singular that Stephen should have chosen as a basis for careful discriminations so loose a catch as this, that "hearsay is not evidence." Of course it often is evidence, in the sense of being logically relevant; what is meant is, that it is not legally admissible. If the phrase "hearsay is not evidence" is to be used in serious discussion, the term "evidence" must have the purely special sense of that sort of evidence which is legally receivable by the courts. The true statement is, that while hearsay may be evidence, it is not admissible evidence; it is a kind of evidence which is rejected. When the writer says that "the doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of, and gives unity to, all these express negative rules," viz., rules "declaring what, as the expression runs, is not evidence,"—does he not overlook the fact that there is no exception whatever to the proposition that "no others may be proved"? and that, since the only exceptions are those to the rule that all relevant facts may be proved, it necessarily appears that matter is rejected on other tests than relevancy? Certainly the twofold doctrine which is named does not "form the centre of, and give unity to, all these express negative rules," in the sense of supplying the test by which they are applied. Something else has to be taken account of; namely, the many practical considerations which the jury system brought vividly home to the judges, as they shaped our rules of evidence in the daily administration of it. When the writer says that he is assumed to know what "evidence" is, he states what is true enough. That is to say, the law does take it for granted that people know how to find out what is and what is not logically probative.

In criticising Stephen's views thus freely I would not seem wanting in respect to a writer who has laid all careful students of evidence under an obligation. No one can reflect deeply on that subject without coming often upon this courageous thinker. He has gone deeper into it than any of our authors.

govern human thought, and so presupposing and conforming to these, it yet recognizes another influence that must, at every moment, be taken into account ; for it is this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined, first, by relevancy, — an affair of logic and not of law ; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter which is logically probative is excluded.

Is it then really so, that this great multitude of decisions that emerge day by day, holding that such and such evidence is or is not admissible, have so little to do with the law of evidence ? Yes. The greater part of them are ultimately reducible to mere decisions of a question of logic as applied to a point of substantive law or pleading. When a man mistakes his proposition of substantive law and seeks to put in evidence to sustain his erroneous view, he is daily told that his evidence is not admissible, — when the thing that is meant is, you are wrong in a point of the law of damages ;¹ or you are proceeding upon a wrong conception of the standard of diligence to which your adversary had to conform ;² or you have a wrong notion of the meaning and contents of the general issue in pleading,³ or of what is put in controversy by a plea of payment. In such cases a determination that what is offered in evidence is or is not receivable, means, (1) you are wrong in your proposition of substantive law ; (2) having regard to the true proposition, your "evidence" (*i.e.*, what you offer as evidence) is logically irrelevant. All such determinations as these, of which there is a vast forest in our books, while they certainly relate to evidence and involve questions of law, involve no point at all in the law of evidence.⁴

¹ *Hart v. Pa. R.R. Co.*, 112 U. S., at p. 343.

² *Grand Trunk Ry. Co. v. Richardson*, 91 U. S., at p. 469.

³ *Marine Ins. Co. v. Hodgson*, 6 Cranch, at p. 219; *Young v. Black*, 7 ib., at p. 567.

⁴ See Mr. Justice Holmes' excellent observations in his *Common Law*, 120-129.

II. But now it is necessary to take notice of a thing which easily escapes attention ; namely, that much of the substantive law is expressed presumptively, in the form of *prima facie* rules. This evidential form of statement leads often to the opinion that the substance of the proposition also is evidential, and then to the further notion, that inasmuch as it is evidential it belongs to the law of evidence. That is an error. In a reasoned body of law like ours, much of it comes about by "intendments." In applying statutory law also, this takes place, but far less conspicuously than in the common law. If we suppose any fundamental proposition of the substantive law, *e.g.*, that when, in negotiating for a sale of specific personal property, the event X happens, with the intention of both parties to sell the property, the sale actually takes place, we observe that this comes to be attended by a crop of subsidiary rules, such as that when Y happens, this necessary intention of the parties presumably exists.¹ The question of intention is not closed to evidence by this rule, — the matter lies wholly open ; but, in applying the law, a certain *prima facie* effect is given to particular facts, and it is not merely given to them once, by one judge on a single occasion, but it is imputed to them habitually, and by a rule which is followed by all judges, and recommended to juries, and even laid down to juries as the binding rule of law. Accordingly the substantive law gets into this shape, that when, in a negotiation for a sale of specific personal property, X happens, with the intention on both sides to sell the property, the sale takes place then ; and when Y happens, this intention presumably exists. Or, to put it shorter, "when X and Y happen in a negotiation for a sale of specific personal property, presumably the sale takes place." Blackburn, in stating these rules, calls them rules of "construction ;" that is to say, rules of the substantive law designed to aid in interpreting the words and conduct of men.²

In such cases, that which is evidential merely, — that is to say,

¹ Blackburn, in his admirable book on Sale, 1st ed., pp. 151-154, gives two such rules, "of which there is no trace in the reports before the time of Lord Ellenborough" (A.D. 1802-1818).

² "A rule of construction may always be reduced to the following form : certain words and expressions which may mean either X or Y shall *prima facie* be taken to mean X. A rule of construction always contains the saving clause: 'unless a contrary intention appear' . . . though some rules are much stronger than others and require a greater force of intention in the context to control them." Hawkins, Wills, preface.

the foundation of a logical inference as to the existence of one of those ultimate facts to which alone, in the first instance, the substantive law annexes its consequences,—has itself become the subject of a rule of substantive law, and comes to have certain consequences directly annexed to it. They are annexed to it originally, because it is in some degree evidential of the ultimate fact ; while the having of a rule about it at all is rested on grounds of policy. The courts have, perhaps, seemed to themselves to abstain from legislation, and to be keeping within the region of mere administration of the existing law, by the expedient of making the rule a *prima facie* one. And yet it is clear that this is true legislation. One may occasionally trace it until it ripens into open and confessed legislation, as in *Dalton v. Angus*.¹ To say, as is sometimes done, that in such cases there is “a rule of law that courts and judges shall draw a particular inference,”² is, perhaps, intended as a mere mode of expression ; but it is misleading, as involving the misconception that the law of evidence has any rules at all for conducting the logical process. It would be accurate to say that the rule of law requires a judge to stop short in the process of drawing inferences, or not to enter upon it at all ; to assume for the time that one fact is, in legal effect, the same as a certain other. The rule fixes the legal effect of a fact, its legal equivalence with another. And it makes no difference in the essential nature of the rule whether this effect is fixed absolutely or *prima facie* : it gives a legal definition. Such is the nature of all rules to determine the legal effect of facts as contrasted with their logical effect. To prescribe a certain legal equivalence of facts, is a very different thing from merely allowing that meaning to be given to them. A rule of presumption does not merely say such and such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them,—sometimes passing first through the stage of saying that it *ought to be* imputed.

I have already said that the nature of these rules is brought out when they ripen from being a mere *prima facie* doctrine into an absolute and incontrovertible one. The familiar doctrine about prescription used to be put as an ordinary rule of presumption ; in twenty years there arose a *prima facie* case of a lost grant or of

¹ 6 App. Cas. 740 ; 2 Greenl. Ev., s. 539.

² Stephen, Dig. Ev., art. 1, defining “Presumption.”

some other legal origin. The judges at first laid down that, if unanswered, twenty years of adverse possession justified the inference; then that it "required the inference," *i. e.*, it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was laid down as a rule of the law of property to be applied absolutely.¹ It is evident, upon reflection, that the rule was always a rule of property, after it ceased to be a mere statement of a permissible inference; of a mere logical fact, *viz.*, that this was generally a right and wise conclusion. When the judges advised the jury, and afterwards directed them as a matter of legal duty to find a lost grant under the circumstances indicated in the rule, they were indeed dealing with evidential, secondary facts, and they adopted the phraseology of reasoning and drawing inferences. But in reality they were laying down a rule of policy² which they themselves had determined to apply, and which they advised and directed their associates in administration, the jury,—their coördinate, and, in a degree, their subordinate associates,—also to apply; a rule which made the twenty years' open and uncontradicted adverse possession a bar. Such advice and such direction is natural and desirable when a presiding learned tribunal is instructing an unlearned one, whose action it has the right to revise; for the administration of the law should be kept consistent. In such cases the judges accomplish, through the phraseology and under the garb of "evidence," the same results that they have long reached, and are now constantly reaching, by the directer means of estoppel. The modern extensions of this doctrine broaden the law by a direct application of maxims of justice,³—a simple method, and worthy of any judicial tribunal which rises to the level of its great office; and yet one not quite

¹ *Dalton v. Angus*, 6 App. Cas. 740; *Wallace v. Fletcher*, 30 N. H. 434; 3 Gray's Cases on Property, 127 *et seq.*

² See *Ld. Blackburn* in *Dalton v. Angus*, 6 App. Cas. 808 *et seq.*

³ It is such things to which Mr. Justice Erle refers in a fine passage where he speaks of Lord Mansfield as "tracing the law upon the question [of copyright in *Miller v. Taylor*] to its source in the just and useful. And Lord Mansfield's authority in this matter outweighs that of Lords Kenyon and Ellenborough, not only . . . , but also because these successors of Lord Mansfield appear to me to have turned away from that source of the law to which he habitually resorted with endless benefit to his country." *Jefferys v. Boosey*, 4 H. L. C., at p. 876. See also Mr. James C. Carter's powerful address on "The Provinces of the Written and the Unwritten Law," New York: Banks & Brothers, 1889.

in harmony with the general attitude of our common-law courts and their humble phraseology in professing to abdicate the office of legislation. But inasmuch as every body of men who undertake to administer the law must, in fitting it to the ever-changing combinations of fact that come before them, constantly legislate, incidentally and in a subsidiary way, it is best that this should be openly done; as it really is in the cautious extensions of the principle of estoppel. The same thing has taken place by presumptions, only it was more disguised. By merely handling "evidence," and fixing upon it a given quality, the judges' denial of any right to make the law seemed to moult no feather.

Let me trace the same process in two more instances. (a) The rule of presumption is that a person shall, in the absence of evidence to the contrary, be taken to be dead, when he has been absent for seven years and not heard from by those who would naturally have heard, if he had been alive. This is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of a time of seven years, and putting this into a rule. The faint beginning of it as a common-law rule, and one of general application in all questions of life and death, is found, so far as our recorded cases show, in *Doe d. George v. Jesson*¹ (January, 1805). Long before this time, in 1604, the "Bigamy Act" of James I.² had exempted from the scope of its provisions, and so from the situation and punishment of a felon, (1) those persons who had married a second time when the first spouse had been beyond the seas for seven years,³ and (2) those whose spouse had been absent for seven years, although not beyond the seas,— "the one of them not knowing the other to be living within that time." This statute did not treat matters altogether as if the absent party were dead; it did not validate the second marriage in either case. It simply exempted a party from the statutory penalty. Again, in 1667, the statute of 19 Car. II., c. 6,⁴

¹ 6 East, 80. Best Ev., s. 409, note, seems to intimate that this may have been an old thing; but there is no ground for it. He refers to *Thorne v. Rolff*, in Dyer's brief report, where something is said of seven years. But the report in Old Benloe, 86, which gives the record, shows that the time was not seven years.

² St. 1 Jac. I., c. 11.

³ Without saying anything about a knowledge of the absent party's existence; and so construed as making such knowledge immaterial. 1 Hale, P. C. 693.

⁴ The ordinary citation. In the "Statutes of the Realm," vol. 5, this statute appears as 18 and 19 Car. II., c. 11.

"for Redresse of Inconveniencies by want of Proove of the Deceases of Persons beyond the Seas or absenting themselves, upon whose Lives Estates doe depend," had provided, in the case of estates and leases depending upon the life of a person who should go beyond the seas, or otherwise absent himself within the kingdom for seven years, that where the lessor or reversioner should bring an action to recover the estate, the person thus absenting himself should "be accounted as naturally dead," if there should be no "sufficient and evident proof of the life," and that the judge should "direct the jury to give their verdict as if the person . . . were dead." But if the absent party should not really have died provision was made for a subsequent recovery by him. The effect of this statute, then, was to end, in a specific class of cases, all inquiring into evidence, by a certain assumption; or, as it is called, by a presumption. The rule fixes, for the purpose of a particular inquiry, the effect of specified facts; absence for seven years, unheard of, is, as regards this particular inquiry, to be accounted as being the same thing as death; it is its legal equivalent.

Now, subsequently, similar cases may have been brought within "the equity" of the statute, as Chief Justice Holt, in 1692,¹ is reported to have "held that a remainder-man was within the equity of that law; but we hear of no suggestion of a general seven-year rule such as we have now, before 1805.² In the case of *Doe d. George v. Jesson*,³ the Court of King's Bench — on a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the Statute of Limitations, which again turned on the time of the death of the lessor's brother, who had gone to sea and had not been heard of for many years — sustained a ruling that the jury must find the time of death as well as they could, . . . that at any time beyond the first seven years they might fairly presume him dead; but the not hearing of him within that period was hardly sufficient to afford that presumption. Lord Ellenborough said: "As to the period when the brother might be supposed to have died, according to the statute, 19 Car. II., c. 6, with respect to leases dependent

¹ *Holman v. Exton*, Carth. 246.

² See, for instance, *Rowe v. Hasland*, 1 Wm. Bl. 404 (1762); *Dixon v. Dixon* 3 Bro. C. C. 510 (1792); *Lee v. Wilcock*, 6 Ves. 605 (1802).

³ 6 East, 80.

upon lives, and also according to the statute of bigamy (1 Jac. I., c. 2), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." This was supporting what the jury had done. All that this case lays down is that the jury were justified, on the analogy of the two statutes, in finding death by the end of the seven years; and, moreover, looking at Mr. Justice Rooke's ruling, which was not questioned upon this point, that they would not be justified in finding it earlier. It was not laid down that they ought to find death at the end of seven years, or that they must; nor was any rule of presumption put forward; nor, as I say, was this the point on which the ruling below was questioned in the full bench.

In 1809, at *nisi prius*,¹ in an action against a woman on a promissory note, she pleaded coverture, and proved her marriage; but the husband had gone to Jamaica twelve years ago, and the question was as to the way of proving that he was now living. The defendant insisted that he must be presumed to be alive; but Lord Ellenborough ruled that "evidence" must be given of his being alive within seven years. This was given, and the defendant had a verdict. In the other case the aim was to prove death; here, life; and here the ruling was that a court cannot assume life now, when all that it knows is that the party has been absent and unheard from for more than seven years. Upon the basis of these cases, there soon appeared in the text-books on evidence, for the first time, in 1815, a general proposition that "where the issue is upon the life or death . . . where no account can be given of the person, this presumption [viz., that a living person "continues alive until the contrary be proved"] ceases at the end of seven years from the time when he was last known to be living, — a period which has been fixed from analogy to the statute of bigamy and the statute concerning leases determinable upon lives."² In this form the matter was again put by Starkie, ten years later, in the first

¹ *Hopewell v. De Pinna*, 2 Camp. 113.

² *Phil. Ev.*, i., 152 (2d ed.).

edition of his book ; and by Greenleaf, and so by Taylor.¹ But the judges as well as text-writers got to expressing what had been put as a cessation of a presumption of life in the form of an affirmative presumption of death ; and this was put as a rule of general application wherever life and death were in question. And so Stephen puts it :² "A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." This rule is set down by Stephen among the few presumptions which he thinks should find a place in the law of evidence ; his definition of the term "presumption" being, as it will be remembered,³ "a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved." Stephen published his Digest in 1876. Here, then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of a like question ; (2) passing into the form of an affirmative "rule of law" requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing from a mere recognition of a step in legal reasoning to a declaration of the legal effect of certain facts.

In Pennsylvania it is possible to put the finger on the very case that accomplished this legislative stroke : the case of *Burr v. Sim*, 4 Whart. 150 (1839). In 1817⁴ the court had laid down the duty of a jury to presume death, without any positive proof of it, when an unexplained absence for many years is shown ; but they refused to adopt a seven years' rule. "I am not," said Tilghman, C. J., "for fixing any precise period after which a presumption of death rises. But here fourteen years and nine months," etc. In *Burr v. Sim*, however, the court (Gibson, C. J.) adopted the English rule, although in Pennsylvania there were no statutes like those in

¹ Starkie, *Ev.* (1st ed.), part iv., p. 458 ; 1 *Gr. Ev.*, s. 41 ; 1 *Tayl. Ev.* (8th ed.), s. 200.

² *Dig. Ev.*, art. 99.

³ *Dig. Ev.*, art. 1.

⁴ *Miller v. Beates*, 2 S. & R. 490.

England ; and they said : " If there is no direct decision, as there is in some of our States, it is because there has been no case requiring it. There is such a case now, and the principle is to be considered as definitely settled." In some States this rule, or the like, has been fixed by statute ; but it is no less well established in others where it rests not upon a statute, but a judicial determination.

(*b.*) Again, the nature of such rules, and the way in which they spring up, may be illustrated by a short line of recent cases in England. In considering applications for relief against an alleged interference with ancient lights, the equity courts lay down the test that a new erection must not render the house, as touching these lights, " substantially less enjoyable." That is the legal rule to be applied. But in determining whether this amount of interference exists in any given case, it was thought convenient by V. C. Stuart, in 1866,¹ to lay down an auxiliary rule, a specific, *prima facie* rule, on the analogy of a recent statute for regulating the height of buildings on streets, so as to prevent the darkening of opposite houses. This statute required that no building should be higher than the width of the street, — so as to leave to their opposite neighbors an angle of light of forty-five degrees. Accordingly, on an application for an injunction against continuing a neighboring erection where no question of the street was involved, the Vice-Chancellor adopted and applied this same rule, adding that he had heard from one of the common-law judges that they proposed, in general, to act on that principle. Here was the starting of a rule of practice, — of administration ; a rule subsidiary to the general one above given, — a rule of presumption ; namely, that in the absence of evidence to the contrary the complainant's property is not substantially less enjoyable when he is left an angle of forty-five degrees of light. This rule had a certain amount of vogue ; and it appears to have been creeping into the position of something more than a mere *prima facie* rule. In 1873² the Lord Chancellor Selborne denied it this character, while still allowing it the place of a mild *prima facie* rule. " With regard to the forty-five degrees, there is no positive rule of law upon that subject . . . ; but undoubtedly . . . if the legislature, when making general regulations as to buildings, considered . . . , then

¹ *Beadel v. Perry*, L. R. 3 Eq. 465.

² *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. 212.

the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury. . . . If forty-five degrees are left, this is some *prima facie* evidence of the light not being obstructed to such an extent as to call for the interference of the court, — evidence which requires to be rebutted by direct evidence of injury, and not by the mere exhibition of models." But even in this dubious form the suggestion of a rule was afterwards repudiated, and we find the Court of Appeal wholly rejecting it in 1880.¹ "It is no rule of law," said James, L.J., "no rule of evidence, no presumption of law, and no real presumption of evidence except of the very slightest kind." The Lord Justices Brett and Cotton also denied it the quality of a rule to guide either court or jury. Here, then, is an abortive rule of presumption, the beginning of which, and the end, we can easily trace.²

The characteristic of all these instances is the same. Matter, logically evidential, has become the subject of a legal rule annexing consequences directly to it ; and this rule takes its place in the substantive law as a subsidiary proposition, alongside of the main and fundamental one, as an aid in the application of it. The law, as I have said, is always growing in this way, through judicial determinations ; for the application of the ultimate rule of the substantive law has to be made by reasoning ; and this process is forever discovering the identity, for legal and practical purposes, of one state of things with some other. Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. Relating, as these declarations do, to specified facts, and groups of facts, and certain aspects and consequences of them, they belong to that part of the substantive law which deals with these particular things ; and

¹ *Ecce. Com. v. Kino*, 14 Ch. D. 213; s. c. 28 W. R. 544.

² See Mr. Justice Holmes's interesting comments upon the earlier cases in this series; *Common Law*, 128. They had attracted my attention quite independently, and I now remark for the first time (since this article was put in print) that he had cited them in a similar line of argument. Perhaps this is only an illustration of that suggestion and stimulus for which so many persons are indebted to this excellent book, although they may have forgotten it.

as Stephen truly remarks,¹ they can be understood only in connection with these branches of the law. They do not belong to the law of evidence. When it is said that if persons contract for the sale of a specific chattel, it is presumed that the title passes; and that when a man voluntarily kills another, without any more known or stated, it is presumed to be murder; and that when a written communication to another is put in the mail, — properly addressed, and postage prepaid, — it is presumed that the other receives it; and that when one has been absent seven years and no knowledge of him had by those who would naturally know, death is presumed; in these cases, rightly considered, we have particular precepts in the substantive law of so many different subjects, — of property, of homicide, of notice, and of persons.

Everybody knows that vast sections of our law have accumulated in this way. It is thus, especially, that Lord Mansfield and others silently conspired with the merchants, and transferred their usages into the law. The nature of this process, as I have said, is not affected by the fact that the judges leave their conclusions open to controversy. That is not an unusual form of legislation even on the part of those who profess to be legislating. Look, for instance, at the following bits of professed legislation running through some centuries, — at times attaching absolute consequences to evidential facts, at times operating contingently. (1) In an often-quoted passage from the laws of Ine, King of Wessex (A.D. 688-725), c. 20,² it is provided that "if a far-coming man or a stranger journey through a wood out of the highway, and neither shout nor blow his horn, he is to be held for a thief, either to be slain or redeemed."³ (2) In the laws of Cnut (A.D. 1017-1035)⁴ we read that if a man brings home a stolen thing, and it is put into the wife's chest, of which she has the key, "then she is guilty." And (3) the laws of Ine⁵ provide that, "if stolen property be attached with a chapman, and he have not bought it before good witnesses, let him

¹ Dig. Ev., note xxxv.

² Thorpe, *Ancient Laws and Institutes of England*, i., 115.

³ It is interesting, in view of Stephen's definition of a presumption, to find him (*Hist. Com. Law*, i., 61) calling this "a presumption of law."

⁴ Thorpe, i., 419.

⁵ Thorpe, i., 119.

prove that he was neither privy (to the theft) nor thief; or pay as *wite* (fine) xxxvi shillings." To be found thus in the possession of stolen goods was a serious thing; if they were recently stolen, then was one "taken with the mainour," — a state of things that formerly involved a liability to immediate punishment, without a trial; and, later, to a trial without a formal accusation;¹ and, later still, subjected a man to the operation of a presumption of guilt which, in the absence of contrary evidence, justified a verdict; and at the present time is vanishing away into the mere judicial recognition of a permissible inference of logic, — as in Stephen's "Digest of Criminal Law." "The inference that an accused person has stolen property or has received it, knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession."² It is to be remarked, of course, that the old modes of trial — the ordeal, the oath, wager of law, battle — were of a sort which differed radically from our conception of a trial. The difference in a criminal case may be expressed by saying that when a man was charged with an offence, he was punished unless he cleared himself. He was offered a certain test, — the oath or the ordeal, — and if he came out of it well he was cleared; if not, he was punished. With us he is not required to clear himself, but those who arraign him must prove him guilty. If we say, as we do, that now a man regularly charged with crime is presumed innocent, we should correctly intimate the old system by saying that he was presumed to be guilty. And so (4) The Assize of Clarendon (1166) required that a person charged under the oath of twelve men of the hundred and four men from each of certain neighboring townships as an accused or notorious robber [or the like], should be taken

¹ Staundford, Pl. Cr. 179 b.

² Art. 308. In a note the learned author adds: "As to the rule as to recent possession of stolen goods, many cases have been decided on the subject . . . ; but they seem to me to come to nothing but this, that every case depends on its own circumstances," etc. Probably the reason of the existence and persistence of the "presumption" to which Stephen here alludes is found in what I have intimated in the text, namely, the long historical root that the thing has. And, indeed, it is found probably in all systems of law. See the opinion of Doe, J., in *State v. Hodge*, 50 N. H. 510. For another instance of this fading away of substantive law, through various stages, into mere evidence, see doctrines as to the crying of the child in tenancy by the curtesy, Bracton, fol. 438, Co. Lit., 1. 1, c. 4, s. 35; and compare Plac. Abb. 267, col. 2 (Hil. 5 Ed. I., A.D. 1276-7), with Paine's Case, 8 Co. 34, 35; 2 Blackst. Com. 127. See *infra*, p. 162, n. 2.

and put to the ordeal of water.¹ (5) By Stat. 25 Jac. I., c. 27,² it is enacted that "Whereas . . . Women . . . delivered of Bastard Children . . . secretly bury or conceal the Death of their Children and . . . if the Child be found dead . . . alledge that the said Child was born dead ; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child . . . were murdered by the said Women . . . be it enacted . . . that if any Woman . . . be delivered of any issue of her Body . . . a Bastard, and . . . endeavour privately . . . so to conceal the Death thereof, as that it may not come to Light whether it were born alive or not, but be concealed . . . the said Mother . . . shall suffer Death as in Case of Murther, except such Mother can make Proof by one Witness at the least that the Child . . . was born dead." (6) The Puritans of Plymouth, in 1671,³ "Ordered, That the Accusation, Defamation, or Testimony of any Indian or other probable circumstance, shall be accounted sufficient conviction of any English person or persons suspected to Sell, Trade or Procure any Wine, Cyder, or Liquors as abovesaid, to any Indian or Indians, unless such English shall upon their oath clear themselves from any such act of direct or indirect Selling, Trucking, or Lending of Wine, Cyder or Liquors to any such Indian or Indians, and the same counted to be taken for conviction of any that Trade any Arms or Amunition to the Indians." The difficulty in such cases was, that while the matter was very pressing, yet they could not swear an unconverted Indian, according to the ideas of that period ; they seem to have reckoned the Indians' god to be the devil. And the only way to handle such cases as

¹ Stubbs (*Select Charters*) seems to misconceive the significance of this when he says : "The ordeal in these circumstances being a resource following the verdict of a jury acquainted with the fact could only be applied to those who were to all intents and purposes proved to be guilty." The ordeal was strictly a mode of trial. What may clearly bring this home to one of the present day is the well-known fact that it gave place, not long after the Assize of Clarendon, to the petit jury, when Henry III. bowed to the decree of the fourth Lateran Council (1215), abolishing the ordeal. It was at this point that our cumbrous, inherited system of two juries in criminal cases had its origin. For the decree of the Council see *Sacrosancta Concilia*, xiii, c. 18, pp. 954, 955 (Venice, 1730) ; and for Henry's writ of January 6, 1219, to certain itinerant justices, with instructions what they were to do now that they had lost the old mode of trial, see 1 Rymer's *Fœdera* (Rec. Com. ed.), 154 ; (old ed.) 228. And see Pike's *Hist. Crime*, i. 467 ; Palgrave's *Eng. Com.*, i. 266 ; Maitland, *Pleas of the Crown for Gloucester*, xxxviii.

² A.D. 1623 ; modelled, apparently, on an edict of Henry II., of France, in 1556, *Recueil des Anciennes Loïs Françaises*, xiii. 472-3.

³ Plymouth Colony Laws, 290, 7.

they mentioned in this law — cases of very imperative urgency — was to let the accusation put the accused to his oath. A similar requirement was made in cases of usury in the Mass. Stat. of 1783, c. 55, referred to by Chief Justice Shaw as "trial by oath," in *Little v. Rogers*, 1 Met. 108: "It seems proper to remark that trial by jury has been substituted for the old trial by oath under St. 1783, c. 55." (7) And, finally, we read in the Gen. Stat. of Vermont, c. 28, s. 78,¹ a common enough provision nowadays, that whenever an "injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury." These are instances of confessed legislation. How do they differ from the rules of presumption established by the judges? Is it not true that neither the one nor the other belongs to the subject of evidence?

III. It may be suggested that there is, after all, a very grave difference between these two classes of things, the Legislature's enacted rule of presumption and the merely judicial rule, — a difference which would be tested by supposing a special verdict that found nothing but the facts named in the rule. It was held long ago² that "request and refusal to deliver [in trover] is good evidence to prove conversion; but if it be found specially it shall not be adjudged conversion." And yet the judges said that upon demand and refusal, conversion will be presumed.³ So in *Isaack v. Clarke*,⁴ Coke, C. J., declared that where a deed of feoffment forty years old is given in evidence at the assizes, and it appears that possession has always gone with it, although livery cannot be proved, he should direct the jury to find it, "for it will be intended; yet if the jury should find these facts specially, we cannot adjudge it a good feoffment, for want of livery." And

¹ Cited in 91 U. S., at p. 456.

² *Agars v. Lisle, Hutton*, 10. And see Ames' Cases on Torts, 391 *et seq.*

³ Coke, C. J., in *Isaack v. Clarke*, 1 Rolle, at p. 131 (1615). In the early cases of *Eason v. Newman*, Cro. El. 495; s. c. Moore, 460 (1595), it was held the other way. In the great case of *Isaack v. Clarke*, the court was equally divided on it; and in *Baldwin v. Cole*, 6 Mod. 212 (1704), Holt, C. J., said: "The very denial of goods to him that hath a right to demand them is an actual conversion, and not only evidence of it, as has been holden."

⁴ 1 Rolle, at p. 132.

again, Brett, L. J., in *Angus v. Dalton*,¹ said of the doctrine of prescription and a lost grant that "none of them [certain judges] meant to say that a special verdict would have been good which did not in terms find the existence of a grant;" although there is no doubt that, according to the view of those judges, a lost grant was presumed in the sort of case which was then under consideration by a very emphatic rule. And so, it may be suggested, is it with judicial rules of presumption generally. By this test their character, as being rules of evidence, and as not being rules of substantive law, may be thought to be fixed; while, as regards legislative enactments of such rules, their quality, as being the contrary, may seem to be shown by the same test.

Now, as to this: (1.) There is no doubt that a statute which attaches legal consequences to facts, although these facts are rather, in their nature, evidential of an objectional something than the thing itself, must be enforced upon courts and juries alike; and it may be added that such legislation is sometimes adopted for the very purpose of compelling juries to recognize the rule which courts lay down, as in the case of the Statute of Stabbing in 1604,² upon which the judges in 1666 "were all of Opinion that the Statute . . . was only a Declaration of the Common Law, and made to prevent the inconveniences of Juries, who were apt to believe that to be a Provocation to extenuate a Murder which in Law was not."³

(2.) And again there is no doubt that, as regards all that class of "presumptions," so called, which are mere judicial recognitions of what is probable, or what is permissible in reasoning, or what a court will recognize as sufficient to support a verdict,—these have no quality of substantive law, although one may need to know the substantive law in order to understand their application.

(3.) As regards cases where there is really a judicial rule of presumption,—that is to say, a rule which the judges themselves announce and follow, and lay down to juries as expressing something more than an accurate conclusion of reasoning,—the judges should give effect to it in construing a special verdict; that is to say, where a jury finds the facts, which, according to the rule as thus adopted by the judges in their own administration of the law, and

¹ Q. B. D., at p. 201.

² Jac. I., c. 8.

³ Lord Morley's Case, Kelyng (old ed.), 55.

laid down for the jury, are stamped with a certain quality, the court should read a special verdict which conformed in its findings to the terms of the rule, as a finding of ultimate facts. Such was the sensible intimation of Doderidge, J., in his opinion in *Isaac v. Clarke*, that there is no sense in the judges' telling the jurors that they ought on their consciences to find a demand and refusal to be a conversion, and yet themselves on their consciences adjudging otherwise.¹ But, of course, it must be carefully observed, that, in order to enable a court in dealing with a special verdict to give effect to a rule of presumption, there must be a finding of *everything* which the rule takes for granted. There must not remain any necessity of weighing the evidence, to see whether all the suppositions of the rule exist or not. It would not do, for example, to expect a court to discover the fact of death, in a special verdict, which stated that A had been absent seven years, without being heard from by those who would naturally have heard of him if he were alive, unless the verdict should also in some way negative the existence of other evidence to show life. For this is the rule,—that a presumption of death arises in the absence of such countervailing evidence. And so as regards demand and refusal in trover; these alone are not enough, without negating the existence of any counter-evidence. But if we assume such a full finding, what reason and what authority is there for saying that a court may not apply to the finding of the jury any "presumption" which may fairly be called a rule of law?² The true doctrine in such a case was expressed by one of our ablest judges, Mr. Justice Thornton, of California,³ in passing upon just such a question as the one in hand, when he said, speaking for the court, "We must read all facts, whether in a pleading of a special verdict, or an agreed statement or finding of facts, in the light of rules of law. Presumptions of law [he was there applying the principle of assuming the continuance of a thing

¹ 1 Rolle, at p. 131. N'est reson que nous dirromus al jurors que ils sur leur consciences doint trouver ceo destre un conversion et tamen nous adjudgeromus auterment sur nostre consciences demesne.

² Observe what happened in dealing with the special verdict in *Tindal v. Brown*, 1 T. R., p. 171, note, when the judges were giving precision to the doctrine of reasonable notice to an indorser. See explanations of this case by Lawrence J., in *Darbishire v. Parker*, 6 East, 3, and by Shaw, C. J., in *Wyman v. Adams*, 12 Cush. 210. And notice also the special verdict in *Paine's Case*, 8 Co. 34, when an old rule was fading out; the jury found that S. "had issue which was heard cry and died." See *ante* p. 158, n. 2.

³ *Kidder v. Stevens*, 60 Cal., p. 419.

once proved to exist] are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable. . . . In other words, a presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it." And it must be remarked that always, in determining the contents of a special verdict, the court must go through the process of interpretation,—sometimes an easy one, sometimes admitting of question. These verdicts, of course, are to be read in connection with the whole record, and as expressing—in addition, perhaps, to much else—the ultimate facts. But they are construed more indulgently than pleadings, being "the words of laymen;" and it is not fatal that they be argumentative, so that they "find the Case in Fact clear and without Equivocation, to common intent."¹ In construing them, all the appropriate considerations of sense and logic, as well as the rules of law, will be taken into account. How far this process of construction may carry a court is indicated in *Plummer's case*, on an indictment for murder, in 1701,² when the verdict stated that one of the defendant's associates in a certain illegal enterprise "did shoot off the Fuzee, and thereby did kill the said," etc. The court said that it was hard to construe a special verdict so as to make this an involuntary shooting; in an indictment its being voluntary must be alleged, but not in a special verdict. "The saying he did it must be understood to be with and not against his will; for where any one upon any killing of a man is to be discharged by an involuntary killing, it must be so found; . . . for a man being a free agent, if he be found to do any act, it must be supposed to be with his will, unless it be . . . found to be against his will."³

(4.) And then, apart from all this, if we assume that judges may decline to apply rules of presumption (properly so called) to a special verdict in such a way as to discern in the verdict something which the jury have not in terms found,—consider why

¹ *Rowe v. Huntington, Vaughan*, p. 75.

² *Kelyng* (old ed.), p. 112.

³ See Lord Blackburn's intimations as to a needless technicality in dealing with special verdicts, in *Dublin R'y Co. v. Slattery*, 3 App. Cas., at pp. 1204-5.

they may do it, and what it is that this really means. It may be done because the judges press their own rights and the jury's duty to a pedantic extreme. It is to be supported, if at all, on the ground that the judges recognize the independence of the jury in finding facts, and their own limited power of enforcing judicial rules. As regards the expressed will of the Legislature, they openly enforce it upon the jury by setting aside verdicts, or refusing to give effect to them. But as touching their own subsidiary legislation, they do not always claim the like full power, and they may justly proceed with reserve in enforcing it upon the jury. The administration of the law should, indeed, be consistent; and therefore what is adopted as a rule by the judges in deciding questions of fact should also govern the jury. But the court must not trench upon the jury's rights; and it is for this reason that they may sometimes abstain from coercing the jury into the adoption of *prima facie* rules of presumption. So that this abstention of the courts proves nothing at all as to the essential quality of these judicial rules,—whether they be in their nature substantive rules of law or not, but only that the judges are prudent, and that their power is limited.¹

IV. I have been speaking of rules relating to specific facts or groups of facts. But sometimes the facts or the situation dealt with are not referable to any one branch of the law, but spread through several or through all of them. Then you have a general principle of legal reasoning. There are many such maxims, which pass current under the name of presumptions,—maxims, ground rules which must be remembered and applied in all legal discussion, such as those familiar precepts that *omnia praesumuntur rite esse acta*, *probatís extremis praesumuntur media*, and the like. And again, in all legal discussion, the existence of the usual qualities of human beings, such as sanity, is assumed, and their regular and proper conduct, and so honesty and conformity to duty.²

¹ Historically, the relations between the court and jury are a very pretty subject of study. The ingenious devices for protecting parties against the eccentricities of the jury are numberless. No one need expect to find any logical consistency in them. The "ultimate facts," in a special verdict, are merely all the facts which a jury has to find in any particular case to enable the court, upon recognized principles, to settle the case. These might be different in an action for malicious prosecution and an ordinary action of damages for negligence, upon the same question of reasonable conduct; because the judges have more power in the former action.

² *De quolibet homine praesumitur quod sit bonus homo, donec probetur in contrarium.* Bracton, fol. 193.

Many of these maxims and ground principles get perversely and inaccurately expressed in this form of a presumption, as when the rule that ignorance of the law excuses no one, is put in the form that every one is presumed to know the law;¹ and when the doctrine that every one is chargeable with the natural consequences of his conduct, is expressed in the form that every one is presumed to intend these consequences; and when the rule that he who holds the affirmative must make out his case, is put in the form of *praesumitur pro negante*. As to such statements, in whatever form they are made or ought to be made, their character is the same, that of general maxims in legal reasoning having no peculiar relation to the law of evidence.

V. If, now, it be asked, What particular effect have rules of presumption in applying the law of evidence? the answer seems to be that they have the same effect (and no other) which they have in all the other regions of legal reasoning. Their effect results necessarily from their characteristic quality. This quality imputes to certain facts or groups of fact a certain *prima facie* significance or operation. In the conduct, then, of an argument, or of evidence, they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced, they settle the question involved in them in a certain way; he, therefore, who would not have it settled so, must show cause. This appears to be the whole effect of a presumption, and so of a rule of presumption. There are various rules of presumption which appear to do more than this, — to fix the amount of proof to be adduced, as well as the duty of adducing something. But the presumption, merely as such, goes no further than to call for proof of that which it negatives, *i.e.*, for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence, or by any other measure of proof. From the nature of the case, in negating a given supposition and calling for argument or evidence in support of it, there is meant such an amount of evidence or reason as may render the view contended for rationally probable. But beyond that a presumption seems to say nothing. When, therefore, it is said that the contrary of any par-

¹ "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." Maule, J., in *Martindale v. Falkner*, 2 C. B. 719.

ticular presumption must be proved beyond a reasonable doubt, as is sometimes said, *e.g.*, of the "presumption of innocence"¹ and the presumption of legitimacy, it is to be recognized that we have something superadded to the rule of presumption, namely, another rule as to the amount of evidence which is needed to overcome the presumption; or, in other words, to start the case of the party who is silenced by it. And so, wherever any specific result is attributed to a presumption other than that of fixing the duty of going forward with proof. This last, and this alone, appears to be the effect of the presumption. It is the substantive criminal law and the substantive law as to persons that fix respectively the rule about the strength of conviction that must be produced in the mind of the tribunal in order to hold one guilty of crime, or to find a child born in wedlock to be illegitimate.²

This article is already long enough. I will not, therefore, go into the questions that are sometimes raised as to conflicting presumptions, and into the perplexing talk about presumptions of law and presumptions of fact. It may, perhaps, be gathered from what has been said that there seems to be nothing peculiar about conflicting presumptions. Rules of law often conflict; and so do logical inferences. As regards *rules* of presumption, — all of them are rules of law, and it seems to make no difference, as regards the subject of evidence or legal reasoning generally, whether they be called by one name or another, law or fact; the effect is the same, — that which has been pointed out. In dealing with the subject of evidence it is expedient to avoid the use of these terms, presumption of law and presumption of fact, for they do not help the discussion, and they are worse than useless, from their ambiguity.³ The mere judicial recognition of a probability or a logical inference is often called a presumption; but in such cases there is no assertion of any rule.

James B. Thayer.

CAMBRIDGE.

¹ Steph. Dig. Ev., art. 94. "Presumption of innocence. If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt."

² See a note in Chamberlayne's edition of Best on Evidence, s. 296, in which my friend, the editor, has here and there, by permission, done me the honor of a quotation.

³ See, *e.g.*, the hopeless confusion of Best, Evid., ss. 321-327.

THE HISTORY OF THE REGISTER OF ORIGINAL WRITS.

II.

IN a former number of this REVIEW I have been permitted to draw attention to some materials for the early history of our common law which have been too long neglected, namely, ancient Registers of Original Writs. I then described two such Registers. One of them (which I refer to as Hib.) seems to be the Register that was sent to Ireland by royal order in 1227; while the other (which I call CA.) seems to be of almost even date, to be, that is, some forty years younger than Glanvill's, some thirty years older than Bracton's, treatise.

When we compare these two Registers together, the first remark that occurs to us is, that in substance they are very similar, while in arrangement they are dissimilar. From this we may draw the inference that the official Register in the Chancery had not yet crystallized; or, to put the matter in another way, that very possibly different officers in the Chancery had copies which differed from each other. Indeed, the official Register of the time may not have taken the shape of a book, but may have consisted of a number of small strips of parchment filed together and easily transposed. There is a certain agreement between them even in arrangement. Both have "Right" in the forefront, and occasionally give us the same writs in the same order. One instance of such correspondence is worthy of note, for it will become of interest to us hereafter. The following seems to be, for some reason or another, an established sequence: *De nativo habendo*, *De libertate probanda*, *De rationalibus divisis*, *De superoneratione pasturæ*, Replevin, *De pace regis infracta* (writs for the arrest or attachment of appellees), *De homine replegiando*, Services and Customs. Traces of this sequence will be found even when the Register, having increased in bulk fifty times over, gets printed in the Tudor days. The writs are arranging themselves in groups: a Writ of Right cluster, an Ecclesiastical cluster, a Liberty and Replevin

cluster. But many questions are very open. Shall the Writs of Entry precede or follow the Assizes? Shall they be deemed proprietary or possessory?

Taking our two Registers together, we can form an idea of the writs which were "of course" in the early years of Henry III.; and these we may contrast with the writs which Glanvill gives us from the last years of Henry II. On the whole, we can record a distinct advance of royal justice; but there have been checks and retrogressions. The Writ of Right, properly so called, the *Breve de recto tenendo*, which commands the feudal lord to do justice, has taken the place of the simple *Precipe quod reddat* as the normal commencement of a proprietary action for land. This is a victory of feudalism consecrated by the Great Charter. Again, in Glanvill's day the jurisdiction over testamentary causes had not yet finally lapsed into the hands of the church; twice (vii., 7, xii., 17) he gives us a writ (*quod stare facias rationabilem divisam*) whereby the sheriff is directed to uphold the will of a testator. This writ we miss in the Registers; the state has had to retreat before the church. We are so apt to believe that in the history of the law all has been for the best, that it is well for us to notice this unfortunate defeat, — for unfortunate it assuredly was, and to this day we suffer the evil consequences which followed from the abandonment by the king's courts of all claim to interfere with the distribution of a dead man's chattels. On the other hand, we see that the triumph of feudalism is more apparent than real; it has barred the high road, but royal justice is making a flank march. Glanvill (x., 9) has a writ which lies for a mortgagor against a mortgagee; or, rather, we ought to say for a gagor against a gagee, when the term for which the land was gaged has expired. The alteration of a few words in this will turn it into a writ of entry *ad terminum qui præteriiit*.¹ Such a writ of entry is given by our two Registers, and they also give the writ *cui in vita* applicable for the recovery of land alienated by a married woman. Curiously enough they do not give the writ of entry *sur disseisin*; though we happen to know that already in 1205 this writ, lying for a disseisee against the heir of the disseisor, had been made a writ

¹ The development can be seen in Palgrave's Rot. Cur. Reg., i., 341, "in quam non habuit ingressum nisi quia predicta B. ei commisit ad terminum qui preteriiit;" ii., 37, "quam pater A. invadiavit B. ad terminum qui preteriiit;" ii., 221, "quam ipse invadiavit C. patri predicti B. ad terminum qui preteriiit," etc.

of course.¹ This is by no means the only sign that the copies of the Register which got into circulation did not always contain the newest improvements. Still, here we see that a foundation has been laid for that intricate structure of writs of entry which will soon be reared. It is very doubtful whether Glanvill knew the procedure by way of attainr for reversing the false verdict of a petty assize; but we find this securely established in our Registers.

Another noteworthy advance is to be seen in the actions which we may call contractual. The *Warrantia Cartæ* is in use, and so is the Writ of Covenant. We may doubt whether there is as yet any writ as of course which will enforce a covenant not touching land. The typical covenant of the time is what we should call a lease; but Glanvill (x., 8) told us that the king's court was not in the habit of enforcing "*privatas conventiones*" agreements, that is, not made in its presence and unaccompanied by delivery of possession. Debt and Detinue are still provided for chiefly by writs of *Justicies*, directing trial in the county court. "Debt in the Bench" seems, as yet, no writ of course, and the Irish Register shows us that, at least across St. George's Channel, one had to pay heavily even for a *Justicies*. The excuse for such exaction, of course, was that no writ was necessary for the recovery of a debt in a local court; royal interference was a luxury. Lastly, we will notice that, as yet, we hear nothing of Account and nothing of Trespass.

The next Register that I shall put in is found in a Cambridge MS. I shall hereafter refer to it as CB. (kk., v. 33). Like the last, it is bound up with a Glanvill, and this, I may remark, is in favor of its antiquity. Edwardian Registers are generally accompanied, not by Glanvill, but by Hengham, or Fet Assavoir or Statutes. On the whole, we may, as I believe, safely attribute this specimen to the middle part of Henry III.'s reign, to the period between the Statute of Merton (1236) and the Statute of Marlborough (1267), and I am inclined to think it older than the Provisions of Westminster (1259). In the following notes of its contents I will give references to the "Pre-Mertonian" Register CA., which I described on a former occasion:—

¹ Rot. Pat. i., 32, contains a writ of this kind, with the note: "*Hoc breve de cetero erit de cursu.*" Even from Richard's reign we have "*in quam ecclesiam nullam habet ingressum nisi per ablatorem suum.*" Rot. Cur. Reg., i., 391.

"*Incipiunt Brevia de Causa Regali.*"

1. Writ of right with many variations. (CA. 1.)
2. Writ of right *de rationabili parte*. (CA. 2)
3. *Ne injuste vexes*. (CA. 26.)
4. *Præcipe in capite*. (CA. 3.)
5. Little writ of right *secundum consuetudinem manerii*.
6. Writs of peace when tenant has put himself on grand assize. (CA. 5.)
7. Writ summoning electors of grand assize, with variations. (CA. 6.)
8. ¹ Writ of peace when tenant of gravelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.
9. *Pone* in an action begun by a writ of right. (CA. 4.)
10. ² *Mort d'ancestor*, with limitation "*post primam coronacionem Ricardi avunculi nostri*." (CA. 16.)
11. *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.
12. *Nuper obiit*.
13. ³ Novel Disseisin, with limitations "*post ultimum reditum J. Regis patris nostri de Hibernia in Angliam*." (CA. 14.) Novel Disseisin of pasture. (CA. 15.)
14. ⁴ Assizes of Nuisance: some being vicontiel, with limitation "*post primam transfretacionem nostram in Britanniam*." (CA. 55.)
15. Surcharge of pasture. (CA. 20.)
16. *Quo jure* for pasture.
17. Attaint in *Mort d'ancestor* and Novel Disseisin. (CA. 50.)
18. Perambulation of boundaries.
19. ⁵ Writ of Escheat: claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.
20. Darrein presentment. (CA. 40.)
21. Writ of right of advowson. (CA. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked "*alio modo sed raro*."
22. *Quare impedit*. (CA. 52.)
23. Prohibition to Court Christian touching advowson. (CA. 41.)
24. Attachment against judges for breach of such prohibition (B. 45.)

¹ The privilege of having a jury instead of a grand assize was granted to the Kentish gravelkinders in 1232. Statutes of the Realm, I., 325.

² The form seems older than 1237.

³ This form seems older than 1237.

⁴ This form seems newer than 1237.

⁵ This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times.

25. *Ne admittas personam.*
26. Mandamus to admit parson. (CA. 43.)
27. Dower *unde nihil habet.* (CA. 46.)
28. Dower *ad ostium ecclesiæ.*
29. Dower in London. (CA. 48.)
30. Dower against deforceor.
31. Writ of right of dower.
32. *Warrantia cartæ.* (CA. 10.)
33. *De fine tenendo:* a fine has been made "*tempore J. Regis patris nostri.*" (CA. 51.)
34. *Juris utrum* for the parson. (CA. 49.)
35. *Juris utrum* for the layman. (CA. 49.)
36. Entry, the tenant having come to the land *per* a villan of the demandant.
37. Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (CA. 11.)
38. Entry, the tenant having come to the land *per* one who was guardian.
39. Entry *cui in vita.* (CA. 12.)
40. Entry, the land having been alienated by dowager's second husband.
41. Entry sur intrusion.
42. Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.
43. Entry *sine assensu capituli.*
44. Escheat on death of bastard.
45. Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.
46. Entry when the land has been given *in maritagium.*
47. Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.
48. Entry for reversioner under a fine.
49. Writ of intrusion.
50. *Quod capiat homagium.* (CA. 13.)
51. False imprisonment: "*ostensurus quare predictum A. imprisonavit contra pacem nostram.*"
52. Robbery and rape: "*ostensurus de robberia et pace nostra fracta, vel de raptu unde eum appellat.*" (CA. 22.)
53. Homicide: "*attachiari facias B. per corpus suum responsurus A. de morte fratris sui unde eum appellat.*" (CA. 23.)
54. *De homine replegiando.* (CA. 24.)
55. *De plegiis acquietandis:* "*justifies talem quod . . . acquietet talem.*" (B. 32.)

56. *De plegio non stringendo pro debito*: do not distrain pledge while principal debtor can pay. (CA. 32 a.)

57. *Quod permittat* for estovers: "*justifies A. quod . . . permittat B. rationabilem estoverium suum in bosco suo quod in eo habere debet et solet.*" Variation for right to fish: "*justifies A. quod permittat B. piscariam in aqua tali quam in eadem habere debet et solet.*" (CA. 57.)

58. Debt: "*justifies A. quod . . . reddat B. xij. marcas quas ei debet,*" vel "*catallum ad valenciam xii. marcarum quas (sic) ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplius,*" etc. (CA. 27.)

59. Debt and Detinue before the king's justices. "*Precipe A. quod . . . reddat B. xij. marcas quas ei debet et in juste detinet vel cattallum ad valenciam x. marcarum quod ei detinet, et nisi fecerit . . . summone . . . quod sit coram justiciariis nostris . . . ostensurus quare non fecerit.*"

60. Replevin. (CA. 21.)

61. Suit to mill: "*justifies A. quod faciat B. sectam ad molendinum . . . quam facere debet et solet.*" (CA. 58.)

62. Customs and services: "*non permittas quod A. distringat B. ad faciendum sectam . . . vel alias consuetudines et servicia que de jure non debet nec solet.*"

63. Customs and services: sheriff is not to distrain B. for undue suit to county or hundred court, etc.

64. Customs and services: "*justifies A. quod . . . faciat B. consuetudines et recta servicia, que ei facere debet,*" etc. (CA. 25.)

65. Customs and services, by *precipe*: "*precipe A. quod faciat B. consuetudines et recta servicia.*"

66. Waste: "*non permittas quod A. faciat vastum . . . de domibus . . . quas habet in custodia, vel quas tenet in dotem,*" etc.

67. Waste: attach A. to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, "*contra prohibitionem nostram.*" (Hib. 51.)

68. ¹*De nativo habendo*: let A. have B. and C. his "natives" and fugitives who fled since the last return of our father King John from Ireland. (CA. 17.)

69. *De libertate probanda*. (CA. 18.)

70. *De racionabilibus divisis*. (CA. 19.)

71. *De recordo et racionabili judicio*. Let A. have record and reasonable judgment in your county court in a writ of right. (CA. 7.)

¹ This form seems newer than 1237.

72. Annuity: "*justifies A. quod . . . reddat B. x. sol. quos ei retro sunt de annuo redditu,*" etc.

73. *Ne vexes*. Do not vex, or permit to be vexed, A. or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (CA. 56.)

74. Wardship in socage: "*justifies A. quod . . . reddat B. custodiam terre et heredis C.,*" etc. (CA. 53.)

75. Wardship in chivalry, the guardian claiming the land: "*justifies,*" etc. Variation when the guardian is claiming the heir's person. (CA. 54.)

76. Aid to knight son or marry daughter: "*facias habere A. rationabile auxilium.*" (CA. 34.)

77. Covenant: "*justifies A. quod . . . convencionem . . . de tanto terre.*" (CA. 36.)

78. Sheriff to aid in distraining villans to do their services.

79. Prohibition against impleading A. without the king's writ. "*R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A. de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii.*"

80. *Ne qui simplicitetur qui vocat warrantum qui infra aetatem est.* (CA. 9.)

81. *Ne quis implacitetur qui infra aetatem est.* (CA. 9.)

82. *Quod permittat*: "*justifies A. quod . . . permittat B. habere quendam cheminum,*" etc., vel "*habere porcos suos ad liberam pessonam,*" etc.

83. Account: "*justifies talem quod . . . reddat tali rationabilem compotum suum de tempore quo fuit ballivus suus,*" etc.

84. Mesne: "*justifies A. quod . . . acquietet B. de servicio quod C. exigit ab eo . . . unde B. qui medius est,*" etc. (CA. 33.)

85. *De excommunicatis capiendis.* (CA. 35.)

86. Prohibition to ecclesiastical judges against holding plea of chattels or debt "*nisi sint de testamento vel matrimonio.*" (CA. 30.)

87. Prohibition to the party in like case.

88. Attachment on breach of prohibition. (CA. 31.)

89. Prohibition in cases touching lay fee. (CA. 28.)

90. *Recordari facias*, a plea by writ of right in your county court.

91. ¹*Quare ejecit infra terminum. Breve de termino qui non preteriit factum per W. de Ralee*: "*Si A. fecerit te securum,* etc. . . *summonere,* etc., *B. etc., ostensurus quare deforciat A. tantum terre . . . quam D. ei demisit ad terminum qui nondum preteriit*

¹ Bracton, f. 220, notices this writ as a newly invented thing. He recommends, however, another form, which is a *Precipe quod reddat*; but the above is the form which ultimately prevailed. Reg. Brev. Orig., f. 227.

infra quem terminum predictus (D) terram illam predicto B. vendidit occasione cujus vendicionis predictus B. ipsum A. de terra illa ejecit ut dicit," etc.

92. ¹ "*Breve novum factum de communi assensu regni ubi de morte antecessorum deficit.*" This is the writ of cosinage.

93. *De ventre inspiciendo.*

94. ² "*Novum breve factum per W. de Ralee de redisseisina super disseisinam et est de cursu.*" Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.

95. ³ "*Novum breve factum per eundem W. de averiis captis et est de cursu.*" After a replevin and pending the plea, the distrainor has distrained again for the same cause . . . "*predictum A. ita per misericordiam castiges quod castigacio illa in casu consimili timorem prebeat aliis delinquendi.*"

96. "*De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis.*" A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.

97. Prohibition to ecclesiastical judges in a suit touching tithes.

98. Writ directing the reception of an attorney in an action. (CA. 37.)

99. *Precipe in capite.* (CA. 3.)

100. Writs directing sheriff to send knights to view an essoinee and hear appointment of attorney. (CA. 38, 39.)

101. Writ to the bishop directing an inquest of bastardy, the plea being one of "general bastardy."

102. Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.

103. *Quod permittat* for common by heir of one who died seised.

104. *Quare duxit uxorem sine licencia. Quare permisit se maritali sine licencia.*

105. ¹ *Monstraverunt*, for men of ancient demesne.

106. Removal of plea from court baron into county court on default of justice.

107. Surcharge of pasture; "*summone . . . B. quod sit . . . ostensurus quare superhonerat pasturam.*" (CA. 20.)

108. Patent appointing justices to take an assise.

109. Prohibition to ecclesiastical judges against entertaining a cause in which B. (who has been convicted of disseising A.) complains that A. has "defamed his person and estate."

¹ Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's Note Book, pl. 92.

² Given by Stat. Mert., cap. 3.

³ This is given by Bracton, f. 159.

⁴ This will hereafter be attracted into the "Writ of Right group" by the Little Writ of Right for men of the Ancient Demesne.

110. *De odio et hatia.*

111. Writ of extent. Inquire how much land A. held of us *in capite*.

112. Mainprise, where inquest *de odio et hatia* has found for the prisoner.

113. Writ of seisin for an heir whose homage the king has taken.

114. Writ of inquiry as to whether the king has had his year and a day of a felon's land.

115. *Warrancia diei*, sent to the justices.

116. Extent of land of one who owes money to the Jews.

117. Prohibition against prosecuting a suit touching advowson in Court Christian.

118. Writ to bishop directing an inquiry when bastardy has been specially pleaded: "*inquiras utrum A. natus fuit ante matrimonium vel post.*"

119. Writ announcing pardon of flight and outlawry.

120. Writ permitting essoiner to leave his bed. Dated A. R. 33.

121. Abbot of N. has been enfeoffed in N. by several lords who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one "*quia non est moris vel juri consonum quod cum plures hereditates in unicum heredem descenderint vel per acquisitionem aliquis possideat diversa tenementa quod pro illis hereditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A. R. 43.¹

Our first observation would be, that the Register has quite doubled in bulk since we last saw it; and our second should, as I think, be, that chronology has had something to do with the arrangement of the specimen that is now before us. The last two formulas are dated, and probably constituted no part of the Register that was copied, but were added to it, having been transcribed from writs lately issued. But leaving these two last formulas out of sight, I think that the last thirty writs or thereabouts are, for the most part, new writs tacked on by way of appendix to the older Register. The line might be drawn between No. 90 and No. 91. The latter of these, the very important *Quare ejecit infra teminum*, is expressly ascribed to William Raleigh, Bracton's master, whose judicial activity came to an end

¹ In 1258-9 suit of court was a burning question. The Provisions of Westminster (cap. 2) laid down the rule, that when a tenement which owes a single suit comes to the lands of several persons, either by descent or feoffment, one suit and no more is to be due from it. This writ deals with the converse case in which several parcels of land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

in 1239. Then, No. 92, the Writ of Cosinage, is "*breve novum*," and we know that this was conceded by a council of magnates in 1237, and was penned by Raleigh.¹ Then again, No. 94 is attributed to Raleigh. It is the Writ of Redisseisin, given by the Statute of Merton. The last of this group of "*Actiones Raleighanæ*" (if I may use that term) deals with the recaption of a distress pending the action of replevin; in spirit it is allied to the Redisseisin.² The next writ, No. 96, is given by the Statute of Merton. The prohibition in tithe suits, No. 97, is the centre of a burning question; and so is No. 118, the writ directing the bishop to say whether a child was born before or after the marriage of its parents. One may be surprised to find this writ at all, after the flat refusal of the bishops given at the Merton Parliament. Of the other writs in this part of the *Registrum*, we may, I think, say that they form an appendix, and are not too carefully made, since some of them appeared in the earlier part of the formulary. Others may be writs newly invented, or old writs that have only of late become "writs of course." The *Monstraverunt* for men of ancient demesne, a writ of critical importance in the history of the English peasantry, is no new thing; but very possibly, until lately, it could not be obtained until the matter had been brought under the king's own eye, or at least his chancellor's eye. The same may, perhaps, be said of the equally important *De odio et hatia*.

In the next place, we see one of the causes at work, which, in the course of time, swells the Register of Original Writs to its great bulk. A group of what we may call fiscal or administrative writs have obtained admission among the writs by which litigation is begun. At present it is small; it includes two writs for "extending" land, and a writ directing livery to an heir whose homage the king has taken; in course of time it will become large.

But turning to the formulas of litigation, we see already a large variety of writs of entry; though as yet the tale is not complete for writs "in the *post*" have not yet been devised, and would, perhaps, be resented by the feudal lords. The Assize of Mort

¹ Bracton's Note Book, pl. 1215.

² The printed *Registrum*, f. 86, says, "*istud breve fuit inventum secundum provisiones de Merton*." But the Provisions of Merton, as we have them, contain nothing but distress.

d'Ancestor is now supplemented by *Nuper obiit* and *Cosinage*. We see signs of growth in the department of Waste. We have something very like a *Formedon*. Annuity and Account have been added to the list of personal actions, but *Trespass* is yet lacking.

A few words about *Trespass*: The MS. registers that I have seen, fully bear out the opinion that has been formed on other evidence as to the comparatively recent origin of this action.¹ Glanvill has nothing that can fairly be called a writ of *Trespass*. His nearest approach to such a writ is "*Justicies*," ordering the sheriff to compel the return of chattels taken "unjustly and without judgment;" but the chattels have been taken in the course of a disseisin, and the plaintiff has already succeeded in an *Assize*.² In later days we do not find this writ; its object seems to have been obtained by the practice of giving damages in the *Assize*.³ But already, in John's reign, we find a few actions which we may call actions of trespass. In some of these, where there has been asportation or imprisonment, the true cause of action in the royal court seems to be that which our forefathers knew as the "*ve de naam*;" "*vetitum naami*;" the refusal to deliver chattels or imprisoned persons upon the offer of a gage and pledge, — a cause of action which had definitely become a plea of the crown.⁴ Also, it is in some instances a little difficult to distinguish an action of *Trespass* from an appeal of felony. Just the

¹ I am happy in being able to refer to what is said on this point by "J. B. A." in *HARVARD LAW REVIEW*, ii., 292. [See also *HARVARD LAW REVIEW*, iii., 29. — ED.] Of course *Trespass* (*transgressio*) was well enough known in the local courts. "*Trespass*" and "*Debt*" were the two great heads of their civil jurisdiction.

² Glanv., xii., 18; xiii., 39.

³ Bracton, f. 179 b. "Item ad officium (vicecomitis) pertinet quod faciat tenementum rescisiri de catallis, etc., quod hodie aliter observatur, quia quaerens omnia damna post captionem assisae recuperabit."

⁴ Rot. Cur. Reg., ii., 34, "A. optulit se versus B. de placito transgressionis." Ibid., 51, "A. queritur quod B. vi sua asportavit bladum de sex acris terre quas disracionavit in curia Dom. Regis (but here the recovery of the land in the king's court is a special reason for its interference). Ibid., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam, et quadrigas suas cum forcia in bosco suo de W. capit et adhuc unam illorum habet et detinet injuste." Ibid., 169, "A. queritur quod B. et C. intraverunt in terram suam de X. vi et armis et in pace Regis et averia sua ceperunt et ten" (*corr. contra.*) "*vadium et plegium tenuerunt.*" Ibid., 260, "A. queritur quod Episcopus Donelmensis cepit eum et imprisonavit et eum retinuit injuste quousque ipsum redemit et eum contra vadium et plegium retinuit."

dropping out of a single word might make all the difference. Thus, on a roll of Richard's reign A. is said to appeal B., C., and D., for that they came to his land with force and arms, and in robbery ("felony" is not mentioned) and wickedly, and in the king's peace carried off his chattels, to wit turves; whereupon B. defends the felony and robbery, and says that he carried off the turves in question from his own freehold.¹ Attempts were made to use the appeal of felony as an action for trying the title to land,—a very summary action it would have been. But the court of John's reign would not suffer this.² On the rolls of the first half of Henry III.'s reign actions of Trespass appear, but they are still quite rare. The advantages of an action in which one can proceed to outlawry are apparent,³ but something seems to be restraining plaintiffs from bringing it. The novelty of the procedure is shown by the uncertainty of the courts as to its scope, particularly when the action relates to land, and title is pleaded by the defendant. We actually find an action of trespass leading to a grand assize. If title is to be determined at all in such an action, it must be determined with all the solemnity appropriate to a Writ of Right.⁴ Bracton, however, who unfortunately has left us no account of this action, shows a reluctance to allow this writ "*quare vi et armis*" to be used for the purpose of recovering land,⁵ and a little later we find it repeatedly said that a question of title cannot be determined by such a writ.⁶ So late as Edward

¹ Rot. Cur. Reg., i., 38.

² Selden Society, vol. 1, pl. 35, "*appellum de pratis pastis non pertinet ad coronam regia.*"

³ Bracton's Note Book, pl. 85.

⁴ Rot. Cur. Reg., ii., 120, A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam . . . B. dicit quod A. non tenet vel tenere debet boscum illum de eo . . . A. ponit se in magnam assisam utrum ipse jus majus habeat tenendi de eo boscum vel ipse in dominico. Et B. similiter." Bracton's Note Book, pl. 835, "A. queritur quod B., C., et D. vi et armis et contra pacem Dom. Regis fuerunt in piscaria ipsius A. . . . et E. (vocatus ad warrantiam) venit . . . et dicit . . . quod ipse debet piscari in eadem piscaria cum ipso A., et dicit quod antecessores sui ibi piscari solent et debent et piscati sunt scil. tempore Henrici Regis avi. . . . A. dicit quod predecessor suus fuit seiscitus de piscaria illa que fuit separabile suum . . . E. ponit se in magnam assisam."

⁵ Bracton, f. 413.

⁶ Placit. Abbrev. 142 (38 Hen. III.), "Et quia uterque dicit se esse in seiscina de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri." Ibid., 162 (1 Ed. I.), "Et quia liberum tenementum non potest per hoc breve de transgressione terminari."

II.'s reign it was necessary to assert against a decision to the contrary that in an action *de bonis asportatis* the judgment must be merely for damages and not for a return of the goods.¹

But meanwhile, Trespass had become a common action. This, on the evidence now in print, seems to have taken place suddenly at the end of the "Baron's war." In the *Placitorum Abbreviato* we suddenly come upon a large crop of such actions for forcibly entering lands and carrying off goods, and in very many of these the writ charges that the violence was done "*occasione turbacionis nuper habitæ in regno*." This may suggest to us that in order to suppress and punish the recent disorder, a writ which had formerly been a writ of grace, to be obtained only by petition supported by golden or other reasons, was made a writ of course, — an affair of every-day justice. Such MS. registers as I have seen seem to favor this suggestion. I have seen no register of Henry III.'s reign which contains a writ of Trespass, and it is not to be found even in all registers of his son's reign.

F. W. Maitland.

CAMBRIDGE, ENG., 1889.

[To be continued.]

¹ Placit. Abbrev. 346 (17 Ed. II.), "In hujusmodi brevi de transgressionem secundum legem," etc., "dampna tantum adjudicari et recuperari debeant."

HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
HERBERT H. DARLING,	CHARLES I. GIDDINGS,
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
CHARLES E. SHATTUCK,	AARON C. THAYER,
EZRA R. THAYER.	

ON Friday, 25 October, the number of students in the Law School rose above two hundred and fifty. This fact is more noteworthy because it is the first time in the history of the School that this point has been reached. The increased membership is an evidence of growing confidence in the management of the School, — a confidence that seems partly warranted by the success of many of the recent graduates, — and as such it is gratifying to all interested in the work of the School. It must be a particular pleasure to the instructors whose efforts thus receive part of the appreciation that is their due.

IN the late case of *Reg. v. Tolson*¹ the Court for Crown Cases Reserved was called on to decide the question whether a woman who marries again after the absence of her husband for less than seven years, but with an honest and reasonable belief that he is dead, is guilty of bigamy, — a point on which previous decisions had been conflicting. The English statute makes it bigamy for a person to marry during the life of husband or wife; a proviso excludes from the operation of the statute the case of continuous absence of seven years or more when the absent party is not known to be living.

In *Reg. v. Tolson* nine judges were for acquittal and five for conviction. The "Law Quarterly" for October,² though not prepared to say that the decision is wrong, questions it somewhat. The case, however, commends itself to common sense, and seems to be right in point of law. There is no doubt that the Legislature has the power to pronounce a second marriage bigamy in any case except that excluded by the proviso, — to enact that no other circumstances shall be a defence; whether or not it has done so is a question of construction. But if such an enactment as this was intended, the most explicit language should have been used; and in the absence of such language the court appears to be justified, in view of the general principles of the criminal law, in refusing to pronounce criminal such an act as that of the defendant in *Reg. v. Tolson*. This view was put forward by Sir James Stephen in his Digest of the Criminal Law,³ and the same learned writer and judge was one of the majority in *Reg. v. Tolson*.

¹ 23 Q. B. D. 168.

² Vol. 5, p. 449.

³ P. 23, n. 4.

The decision seems to have been put on the ground just stated, and no great stress was laid on the doctrine *non est reus nisi mens sit rea*.

In Massachusetts, on a similar state of facts, an opposite decision was reached.¹

THE final ruling of the court in the Cronin murder trial, admitting the testimony of a witness for the prosecution who had evaded the intended effect of the order excluding the State's witnesses from the courtroom by reading the testimony in the newspapers, is in accord with the later and sounder decisions on the subject. The court is reported in the papers to have said: "The rule of extension would unquestionably apply as well to newspaper reading as to exclusion from the room, and in making my ruling at this time I feel that I am changing the rule, and I think it is necessary, in view of modern newspaper circulation." Instead of changing, the court appears to have followed the existing rule. In the case in question, merely the spirit of the court's order was violated, and unintentionally. In most of the decided cases the witness actually remained in court in direct disobedience of the order. Yet, on what would seem to be the sounder cases, the power of the judge is limited to punishing the witness for contempt;² and in jurisdictions where the judge is held to have the right altogether to exclude the disobedient witness, if he sees fit, that right is very rarely exercised.³

WHILE writers are clamoring for a restatement of the hearsay rules of evidence, legislatures continue to make minor changes. The agitation and the legislation are proofs of discontent with the present state of things, and presage, perhaps, more extensive alterations. Massachusetts during the past year has enacted a relaxation in one small particular,—a tardy reform, even if trivial. It is almost fifty years since it was made a crime as serious as manslaughter to cause death by attempted abortion; and now chapter one hundred of the Acts and Resolves of 1889 allows the admission in evidence of the dying declaration of a woman in a criminal prosecution⁴ for causing her death. There exists a similar statute in New York.⁵

But the Massachusetts statute leaves open one point that may give a little trouble: it does not specify for what precise purposes such declarations may be used. So far as the wording of the statute goes, there is no objection to using these dying declarations for the proof of any fact that may be controverted, provided the case is one where the death of the woman is alleged to have resulted from the use of drugs, etc. If this obvious construction of the statute be the true one, the use of dying declarations in this class of cases will be extended beyond their scope in actions for homicide at common law.⁶ The corresponding New York statute, mentioned above, precludes any doubt, by providing that such declarations "shall be admitted in evidence subject to the same restrictions as in cases of homicide." Even if the statute be one of no great importance, and even if the meaning of the statute be apparently clear, still it seems that it would have been better to provide against any latent doubt by the addition of a few words.

¹ *C. v. Mask*, 7 Met. 473; but see the comments of Bishop, Crim. Law, 303 a, note 4, 15, who remarks that the case is not in accord with some other authorities in this country.

² *Cobbett v. Hudson*, 1 E. & B. 11; *Gregg v. State*, 3 W. Va. 705; *Parker v. State*, 37 Md. 329.

³ *Pleasant v. State*, 15 Ark. 624; *Sartorius v. State*, 24 Miss. 602.

⁴ Under F. S., ch. 207, § 9.

⁵ Banks' Revised Statutes of New York, 6th ed., vol. 3, pt. 2, ch. 1, § 14, at p. 933.

⁶ Best on Evidence, p. 484, n., Chamberlayne's ed.

THE writer of a recent article¹ in the "Law Quarterly Review," while commenting on the notoriously onerous and thankless office of the English trustee, describes a system of joint-stock companies that has been developed and legalized in Victoria for the purpose of managing estates and investments in the place of executors, administrators, and trustees. These corporations or joint-stock companies have the rights, duties, and legal obligations of paid fiduciaries. In other words, Australia has adopted the American trustee in place of the English trustee.

But in the meantime England has allotted her trustees a little more freedom. The recently enacted Trust Investment Act,² supplanting quite a number of statutes³ previously passed with a view to greater liberty of investment, permits an increased range for investing trustees. The effect of this act is, that a trustee may now, as previously, invest in securities on land situated in Great Britain and Ireland, in any securities the interest of which is or shall be guaranteed by Parliament, in stock of the banks of England and Ireland, in East India stock, in consolidated stocks of the Metropolitan Board of Works, or in stocks recommended by the court from time to time for the investment of cash. In addition, certain kinds of railway, canal, and water bonds and stocks, together with municipal and county loans, are now designated as proper investments. But the position of the English trustee is nevertheless not much improved. For instance, there are further restrictions as to the price to be paid for redeemable securities, while the designated stocks and bonds are very carefully selected. Furthermore, the fundamental distinction which contrasts the English trustee so strongly with the American trustee still remains — the English trustee receives no pay.

It is interesting, if not slightly flattering, to notice the triumph of the paid trustee with large discretion as to investments, over the old-time unpaid trustee of England in the new continent of Australia. This victory seems to justify the full powers given to fiduciaries in the United States, while at the same time it strengthens the doubt as to the relative efficiency of the English trustee even at home.

THE Court of Appeals of Kentucky must be overworked. Judge Holt seems to be convinced that ice in an ice-house may be treated as a fixture. "If it [*i. e.*, a chattel] have a special adaptation to the use to which the freehold is being applied, and its removal would seriously impair its value, then such an intention may fairly be inferred as to constructively connect it with the freehold, and the business for which it is being used. Turning from this general law of fixtures to the case in hand, we find that the property sold was an hotel for the use of which ice is almost, if not quite, indispensable,"⁴ etc. It is not quite clear from the judge's language just what the ice is affixed to; ice-house, hotel, freehold, and business, together with realty, are all mentioned in dangerous proximity. We are afraid that some one⁵ may feel called on to tell the truth to the Court of Appeals of Kentucky, even as Gil Blas felt moved to speak to the fictitious Archbishop of Granada.

¹ 5 L. Q. Rev. 395. Administration of Trusts by Joint-Stock Companies, T. Crisp Poole.

² 52 and 53 Vict. c. 32; L. R. 26 Stats. 97, 12 Aug. 1889.

³ 22 and 23 Vict. c. 35, § 32, 1859; 23 and 24 Vict. c. 38, § 11, 1860; 30 and 31 Vict. c. 132, 1867; 34 and 35 Vict. c. 47, § 13, 1871.

⁴ *Hill v. Munday*, 11 S. W. Rep. 956 (Ky.), 21 June, 1889. It may be observed, however, that this doctrine as to fixtures is not strictly necessary to the decision.

⁵ See 40 Albany Law Journal, p. 102. "We wish that something could be done to infuse a little common sense," etc., etc.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

THE DISCUSSION OF PRESCRIPTION IN *Angus v. Dalton*.¹—(From *Professor Gray's Lectures*.)—The practice of authorizing the jury to find a lost grant of an easement or other incorporeal hereditament was introduced by the English judges to avoid the inconvenience resulting from the fact that the presumption raised by length of time failed if the disputed right was shown to have originated since the time of legal memory. This presumption of a lost grant, raised by an enjoyment of the easement under the proper conditions for twenty-years,—a period adopted by judicial legislation from the analogy of the Statute of Limitations,—was at first a pure presumption of fact, rebuttable by proof that there had been no grant.² But the fiction was so strong that the judges were always somewhat uneasy under it, and as time goes on we find it gradually changing and hardening into a presumption of law.³ In the midst of this process came the Prescription Act⁴ (1832), which left the subject of prescription in a state of arrested development. For the next fifty years, during which the courts of this country were working out the subject without statutory aid, English decisions were chiefly under this statute, so that little was heard there of the theory of a lost grant. But ten years ago the case of *Angus v. Dalton* brought up a *casus omissus* in the Prescription Act; and the judges were therefore forced to take up the law in the transition period where it had been left when that act was passed, and to decide the case on common-law principles.

This is probably the explanation of the wide difference of opinion noticeable among the judges in *Angus v. Dalton*. We find the view advanced, that twenty years is an absolute bar, on the analogy of the Statute of Limitations (this theory, advanced by Lush, J., in the Queen's Bench Division, did not meet with general favor among the other judges; it is in substance the prevailing doctrine in this country); that it raises a mere presumption of fact, rebuttable by proof that there never was a grant (a view of Cockburn and Mellor, JJ., in the Queen's Bench Division, and of Brett, L.J., in the Court of Appeal); that the presumption is one of law, which can be met, not by showing that there was no grant, but only that there could have been none (the view of the majority of the Court of Appeal). As to the particular question raised by the case, the right of support for buildings, the judges are evidently embarrassed by the attempt to distinguish it from such a case as *Webb v. Bird*,⁵ where it was held that no prescriptive right to the

¹ 3 Q. B. D. 85; 4 Q. B. D. 162; 6 App. Cas. 740.

² *Darwin v. Upton*, 2 Wms. Saund. 175, note.

³ See remarks of Lord Ellenborough in *Bealey v. Shaw*, 6 East, 208, 215; *Balston v. Brunsted*, 1 Camp. 463, 465.

⁴ 2 and 3 W. IV. c. 71, § 2.

⁵ 13 C. B. N. s. 841.

access of air to a wind-mill could be gained, because of the impossibility of interfering with the user. They rely chiefly on the settled law in regard to lights, the peculiarities of which are in many ways not unlike those of support; but they evidently feel a difficulty in dealing with either case on principle, a difficulty which is frankly expressed by Fry, J., in the House of Lords. In the United States the doctrine of acquired rights to light is generally rejected, following *Parker v. Foote*,¹ and the right to support would probably be treated in the same way.

In regard to the general doctrine of prescription, the question of *Angus v. Dalton* really comes down to this: is the presumption one of law or fact? The view of the majority in the Court of Appeal—that of a presumption of law, rebuttable only by proof that no grant could have been made—is ingenious and plausible; but it is, as Brett, L. J., points out, hardly more than an indirect and rather artificial way of reaching the conclusion of Lush, J., and of many of the American courts. And this conclusion—an arbitrary rule that twenty years' enjoyment under the proper conditions gives an absolute right, on the analogy of the Statute of Limitations—is that to which it seems that the law must ultimately come. Though a pretty strong instance of judge-made law, it is reasonable and satisfactory, and accomplishes the eminently desirable result that two subjects so similar (the acquisition of rights by prescription and under the Statute of Limitations) are put on the same footing.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

CHATTEL MORTGAGES—DEFINITENESS OF DESCRIPTION.—A chattel mortgage described the property as "all my crop of corn, cotton, and other produce that I may raise for the year 1884, in Faulkner county." *Held*, that this description is sufficiently definite to make the record of the mortgage constructive notice to purchasers of the crop. *Johnson v. Grissard*, 11 S. W. Rep. 585 (Ark.).

A description which will enable a stranger, aided by such inquiries as the mortgage itself suggests, to identify the property, is sufficient. But if, after reasonable inquiry, the subject-matter of the mortgage is still indefinite, the record is no notice to purchasers. *Jones on Chattel Mortgages*, §§ 54-5. Thus a mortgage of all the crops raised by the mortgagor in his county for three years is too indefinite. *Muir v. Blake*, 57 Iowa, 662.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The Rhode Island statute authorizes the confinement of the insane in State institutions by the parents or guardians, etc., on presentment to the superintendent of a certificate "from two practising physicians of good standing," that such person is insane. None of the modes provided for procuring discharge can be resorted to as of right in his own behalf by the person confined. *Held*, this statute violates Const. R. I., art. I, § 10, providing that every person shall be at liberty to speak for himself, and no person shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land. As a legal proceeding in which a person proceeded against, if concluded thereby, has not an opportunity of defending himself, is not "due process of law," the statute also violates Const. U. S., Amend. XIV. *In re Gannon*, 18 Atl. Rep. 159 (R. I.).

¹ 19 Wend. 309.

CONSTITUTIONAL LAW — TAKING PROPERTY WITHOUT COMPENSATION. — Where one lives on farm lands outside of a city, as shown by public or private improvements, though within its corporate limits as defined by the Legislature, and beyond the adjacent districts that will be benefited by its municipal expenditures, an act of the Legislature subjecting his property to taxation for corporate purposes of the city is in violation of Const. U. S., Amend. V., providing that private property shall not "be taken for public use without just compensation." *Territory v. Daniels*, 22 Pac. Rep. 159 (Utah).

CONTRACTS — ILLEGALITY — WAGERING CONTRACTS. — A contract between brokers and their principal was that they should make purchases and sales for his account on the Board of Trade, but that in accordance with the usages of the Board, they should procure these to be set off against each other, the principal to receive and deliver no merchandise, but only to pay or receive the differences between purchase and selling prices. An action was brought for commissions, *Held*, that, although the contracts made on the Board of Trade by the plaintiffs were legal, yet the special agreement between the plaintiffs and defendant was a wagering contract, and as such, not only void, but illegal, and that plaintiffs could not recover commissions due or money paid in pursuance thereof. *Harvey et al v. Merrill et al.*, 22 N. E. Rep. 49 (Mass.).

The above decision goes but a step further in following the American interpretation of provisions against wagering contracts in general, and "dealing" in "options" and "futures" in particular. Their uniform tendency has been towards a rigid enforcement of both the spirit and letter of the law. Mr. Justice Harlan, in delivering the opinion of the Supreme Court, in *Emery v. Jemison*, 131 U. S., 336, expressly affirms the doctrine propounded by that court in *Irwin v. Williar*, 110 U. S. 499, to the effect that "all such contracts are held to be illegal and void as against public policy." The broker in such cases is regarded as "*particeps criminis*," being "privity to the unlawful designs of the parties." The authority most often cited in recent American cases is a passage in Benjamin on Sales, § 542 (Bennett's notes, 1888); viz., "the whole transaction constitutes nothing more than a wager, and is null and void under the statute." The statute referred to is 8 and 9 Vict. c. 109, § 18. The "Law Quarterly Review," for July, 1889, calls attention to the line of decisions in the English courts interpreting this same statute. It is interesting to the student of judicial legislation to note how widely they diverge in their practical effects from the decisions in our own courts.

The latest case is *Cohen v. Kittel*, 22 Q. B. D. 680; it places the limit to which the English courts consent to go, and refuses to allow a principal to recover from a broker the amount of profits lost through the broker's failure to make certain bets. But *Read v. Anderson*, 13 Q. B. D. 779, decides that if the agent has made bets on certain horses for his principal, but in his own name, and by the rules of his association, will be ruined in his professional prospects unless those bets are paid, he has a right to pay the bets at the expense of his principal. *Bridges v. Savage*, 15 Q. B. D. 363, makes the agent liable to pay over to his principal winnings made on bets for that principal. It goes on the ground that wagering contracts are not illegal,—they are merely void. The trade of a "betting agent" is not unlawful. Perhaps the leading case, however, is *Thatcher v. Hardy*, 4 Q. B. D. 693, where the facts were substantially the same as those above stated in *Harvey v. Merrill*. The court allowed the broker to recover his commissions, and Bramwell, J., in concurring on appeal, says *apropos* of the argument concerning public policy: "I am not sure that it is a disadvantage that there should be a market where speculation may go on, for it is owing to a market of that kind that we now have so many railways, and other useful undertakings." The inquiry of the "Law Quarterly Review" seems quite pertinent: "Have not the courts unintentionally nullified the effect of 8 and 9 Vict. c. 109, § 18?"

CONTRACTS — PARTIES — RIGHT OF BENEFICIARY TO SUE. — In an action by an administratrix on a promissory note, the defendant offered to prove as a defence, that before the note matured the plaintiff's intestate had, upon a good consideration, promised defendant's father never to sue the defendant upon the note. *Held*, that such a promise was no defence to the action. As the defendant was merely the beneficiary of the contract, he could not have sued upon it, and he cannot therefore use it as a defence. The fact that the promise

was made to the defendant's father is immaterial. *Marston v. Bigelow*, 22 N. E. Rep. 71 (Mass.).

This case emphasizes and extends the rules of *Exchange Bank v. Rice*, 107 Mass. 37, limiting the right of a beneficiary to sue on a contract. Formerly it was laid down broadly in Massachusetts that the beneficiary had such a right, relying upon early English cases which have since been overruled. *Felton v. Dickinson*, 10 Mass. 287; *Brewer v. Dyer*, 7 Cush. 337. In *Mellen v. Whipple*, 1 Gray, 317, the right was denied as a general rule; but three exceptions were made in order to reconcile previous cases,—viz., in certain cases where the equitable action for money had and received would lie; in cases where promises have been made to a father or uncle of the plaintiff for his benefit; and in cases like *Brewer v. Dyer*, *ubi supra*, where an assignee of a lease had promised his assignor, in writing, to pay the rent to the lessor. The last two of these exceptions were questioned in *Exchange Bank v. Rice*; the second is by this case declared not to be law; and the only Massachusetts case upon which it rests, *Felton v. Dickinson*, *ubi supra*, is distinguished. The case is in line with that of *Tweddle v. Atkinson*, 1 B. & S. 393, and by it the Massachusetts law seems to be brought into substantial accord with the English; for the third exception, made by the case of *Brewer v. Dyer*, *ubi supra*, cannot be regarded as of much authority, since the criticism of it by Gray, J., in *Exchange Bank v. Rice*, 107 Mass. 37, at p. 43.

CONTRACTS — TELEGRAPH. — One who makes a contract by telegraph does not constitute the company his agent, and is not bound by mistakes in transmission. *Pepper v. W. U. Tel. Co.*, 11 S. W. Rep. 783 (Tenn.).

This case seems to be right in its results. A telegraph company is not a general agent of the sender, for it is authorized to deliver a certain message only. It may be called a special agent. If it delivers a different message from that authorized, it has exceeded its authority. The receiver knows the scope of the company's business, and he cannot hold the sender liable, on the ground that he has held the company out as possessing any greater authority. Gray on Telegraph, §§ 104, 105. English cases accord. *Henkel v. Pope*, L. R. 6 Ex. 7.

American cases are *contra*. *W. U. Tel. Co. v. Shetter*, 71 Ga. 760; *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 35 Pa. St. 298; and cases in Gray on Telegraph, § 104, n. 3.

CRIMINAL LAW — ESCAPE PENDING APPEAL. — Where one convicted of murder escapes from jail, pending appeal, and fails to comply with an order of the court to surrender himself to abide the result of the judgment of the appellate court, the appeal will be dismissed. *State v. Carter*, 11 S. W. Rep. 979 (Mo.).

This is in accordance with the general view in this country, as see cases cited in note to Wharton, Crim. Pl. (ninth ed.), § 774 a.

EQUITY JURISDICTION — HUSBAND AND WIFE — SUIT FOR SUPPORT. — Where a husband sends away his wife, and refuses to permit her to return, in a suit by the wife, without reference to whether it is for a divorce or not, a court of equity has power to compel a husband to perform his legal duty to support his wife and children. *Earle v. Earle*, 43 N. W. Rep. 118 (Neb.).

EVIDENCE — PRESUMPTION. — Where a freed negress, more than fifty years old, bought up her own daughter, it is presumed that the daughter was given her freedom. *Powell v. Conn.*, 11 S. W. Rep. 814 (Ky.).

EVIDENCE — RES GESTÆ. — A statement by the victim, to one whom he called to his assistance, that he was robbed and assaulted about half a minute before, by men whom he described, is part of the *res gestæ*, and admissible in evidence against the alleged murderers. So also are statements made ten minutes later, to a friend for whom deceased sent, immediately after the assault. *State v. Murphy*, 17 Atl. Rep. 998 (R. I.).

This is evidently a broader doctrine than that laid down in *Bedingfield's case*, 14 C. C. C. 341, and in line with the general trend of American decisions. *Com. v. Hackett*, 2 Allen, 136. The admissibility of the declarations to the friend seems very questionable, however, though from the facts in the case they might possibly have been brought in under the head of "dying declarations." See *Waldele, Adm'r. v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274; *V. & U. R. Co. v. O'Brien*, 119 U. S. 99. For a valuable discussion of this vexed subject see 15 Am. L. Rev. 78.

MORTGAGES — POWER OF SALE — LIMITS OF MORTGAGEE'S DISCRETION. — A mortgagee is not a trustee for the mortgagor of his power of sale, and the court

has nothing to do with his motives in exercising it; but the court will consider whether he exercised reasonable care and prudence to realize a fair price. He cannot offer the property to a purchaser for an amount that will cover merely his own claim, independently of the value of the property. *Colson v. Williams*, 61 L. T. Rep. 71 (Eng.).

NEGLIGENCE — LETTER-CARRIER — LOSS OF REGISTERED LETTER. — A letter-carrier, having a registered letter containing \$100 for A, delivered it to the clerk at the hotel, where A was a guest, the clerk signing a receipt both upon the letter-carrier's book and upon a card to be returned to the sender. The letter was placed by the clerk in the letter-box of the hotel, from which it was purloined. It being the duty of the letter-carrier to deliver a registered letter only to the person to whom it is sent, or upon his written order, the carrier paid A \$100, and then brought an action against the clerk for the amount so paid out, charging him with negligence in not delivering the letter. *Held*, the clerk is liable, as he assumed the bailment voluntarily, and must have known the letter was of more than ordinary importance. *Joslyn et al. v. King*, 42 N. W. Rep. 756 (Neb.).

NUISANCE — REASONABLE USE OF LAND. — The owner of land may cultivate it in the usual and reasonable manner, without liability to a lower proprietor whose mill-pond is injured by the soil being drained into it by reason of such cultivation. *Middlesex Co. v. McCue*, 21 N. E. Rep. 230 (Mass.).

POWERS — RIGHTS OF DONEE'S CREDITORS. — Devise in trust for H (then insolvent) for life, and at his death, "to whom and in such manner as H shall direct." H appointed to his wife. *Held*, the estate was not subject to the claims of those who were creditors of H before the creation of the power. *Wales, Adm'r, et al. v. Bowditch, Ex'r, et al.*, 17 Atl. Rep. 1000 (Vt.).

The case arrives at this conclusion after a full consideration of the authorities, although recognizing that the result is opposed to the mass of the decisions. For the contrary view see *Leake's Dig. of the Law of Prop. in Land*, pp. 426-7, and cases there cited.

REAL PROPERTY — FIXTURES. — Rails of a tramway used only for temporary purposes are not fixtures. *De Laine v. Alderman*, 9 S. E. Rep. 950 (S. C.).

REAL PROPERTY — PARTY WALLS — RIGHTS OF OWNERS. — The party wall between the houses of the plaintiff and defendant was built by the owner of both estates and conveyed as the partition wall between the houses. There was no express grant, or agreement, or statute defining or limiting the rights of the parties. The defendant, in altering his house, made a considerable addition to the height of the wall, and the plaintiff brought his bill in equity to compel the removal of so much of the addition as was upon his side of the division line. *Held*, that the defendant had a right to make additions to the wall, provided that he did so without injury to the original wall, and that the bill must therefore be dismissed. *Everett v. Edwards*, 22 N. E. Rep. 52 (Mass.).

This case is valuable for the discussion which it contains as to the rights of a joint owner of a party wall when they are not defined by a special agreement. The opinion calls attention to the inconsistencies entailed by treating such an owner as a tenant in common, according to the English view, *Watson v. Gray*, L. R. 14 Ch. D. 192, or as a tenant in severalty of the half upon his own land, with an easement in the other half, according to the New York view, *Partridge v. Gilbert*, 15 N. Y. 601. The court, by W. Allen, J., proceeds to give its own solution of the problem, as follows: "The estate which the owners have in it is an estate in a party wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party wall, rather than by classifying it with other estates, and deducing its qualities from the name given to it. In effect each owner acquires the right to build one-half of his wall upon his neighbor's land, and each contributing his portion of the expenses has a right to an equal benefit in the wall so built. The wall is a substitute to each for a separate wall, and there can be no implied limitation of his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor." An "estate in a party wall" is not mentioned in Littleton, but the recognition of its true nature seems to be an eminently sensible way of meeting the difficulties of the question.

TRUSTS — CHARITIES. — Property was devised to a lodge of Odd Fellows "for the benefit of the widows and orphans." The lodge was holding all the prop-

erty that its charter allowed. *Held*, that the charity was sufficiently definite for the State to enforce, and that the failure of the trustee to act would not cause the property to revert to the heirs. Moreover, the capacity of the corporation could not be questioned by the heirs, but only by writ of *quo warranto*. *Heiskell v. Chickasaw Lodge*, 11 S. W. Rep. 825 (Tenn.).

In England, when property is devised for indefinite charities, and no trustee is appointed, or those appointed cannot act, the king, as *parens patriæ*, will direct the application of the fund as he thinks best. This prerogative is exercised by the chancellor under the sign-manual of the king. The power also extends to those cases where the charity is illegal or cannot be carried out. In the United States there is no one to exercise this prerogative, unless, as in Pennsylvania, the Legislature confers it by statute. • *Perry on Trusts* (3d ed.), §§ 718, 721; *Kent's Commentaries*, vol. ii. (12th ed.), p. 508, n. 1; *Jackson v. Phillips*, 14 Allen, 539. It is held in many States in this country, that, in place of this prerogative power, the courts of equity, as such, are bound to carry out the testator's intention as nearly as possible, and where the particular charity has failed, will substitute another charity of the same nature. This power does not cover indefinite charities, which revert to the heirs.

WILLS — TESTAMENTARY CAPACITY — BURDEN OF PROOF. — The presumption of the law is in favor of testamentary capacity, and the burden of proof is on those who assert the contrary. *McCoom v. Allen*, 17 Atl. Rep. 820 (N. J.).

This seems to be an instance of confounding the "burden of proof" with the "burden of going forward with evidence." According to the accepted doctrine the burden of proving testamentary capacity, *i.e.*, that the will was made by a testator of sound and disposing mind, was on those setting up the will, though after a *prima facie* case had been made out in their favor it might become necessary for the other side to go forward with evidence of testamentary incapacity or be defeated. *Sutton v. Saddler*, 3 C. B. N. s. 87; *Barnes v. Barnes*, 66 Me. 286.

REVIEW.

A TREATISE ON THE LAW OF CONVEYANCING. By W. B. Martindale, second edition by Lyne S. Metcalfe, Jr. St. Louis: Central Law Journal Co.

For the student who desires a thorough knowledge of the foundation principles of the subject of conveyancing, this book is too closely confined to modern American practice. Those old statutes of *De Donis*, *Quia Emptores*, and especially the Statutes of Uses and Enrolments, receive but the merest mention. Considering how little is said of either future estates or the Statute of Uses, it seems a pity to leave the reader in the least doubt whether a "freehold may be limited *in futuro* by bargain and sale." (63, note 1.)

For the actual conveyancer, the subject is not treated enough in detail. Deeds, leases, mortgages, and wills are all included in the 600 pages of reading-matter. One would think that seals might be treated exhaustively, even if some less relevant matter should be omitted. On examination we find that New York alone is charged with refusing to recognize a printed seal, whereas Massachusetts has done the same. The subject of stamps is not even mentioned, nor is a single form given.

Still the book is of convenient size, and is splendidly indexed. To the readers who desire a general knowledge of settled principles the book is valuable. This class probably calls for the second edition.

The alterations of the text in the second edition are not numerous, but the number of cases cited is somewhat increased. C. H.

HARVARD LAW REVIEW.

VOL. III.

DECEMBER 15, 1889.

NO. 5.

THE POLICE POWER AND THE RIGHT TO COMPENSATION.¹

I.

IT is the purpose of this essay to indicate as briefly as possible how far the State, while acting on or affecting private property in virtue of its police power, is under a necessity of providing compensation to the owner for any loss he may have sustained. It is essential to a clear understanding of the subject to define "property"² and "police power," and to ascertain in what ways the State can "act on" or "affect" property.

Property is a legal fact, consisting of two relations. The first subsists between the owner and the *res*, or thing owned, and is *purely non-legal*, being simply the physical power of the owner to use the thing. The second subsists between the owner and the rest of society, and is *purely legal*, being the right of the owner that nobody shall interrupt or in any way prejudice the relations between himself and the subject of his ownership. Property may be limited in various ways; but, when it is full and complete, its non-legal element, the power of the owner to use the *res*, is limited only by the character of the *res* or by the capacities of the owner;

¹ This article is the Law School Association Prize Essay, and at the request of the *Harvard Law School Association* is sent to all the members.

² See the interesting remarks of Mr. Lewis in the preface to his recent book on "Eminent Domain." He says the "early cases attacked the subject wrong-end first, so to speak, through the word *taken*, instead of through the word *property*." Lewis, *Em. Dom.*, p. 1.

in this view purely quantitative, and logically does not justify the distinction that has in fact been adopted.

An undoubted case of the taking of property is found when there is a physical injury to, or destruction of, the *res* itself, such as the flooding of land,¹ or the abatement of a nuisance.² These destroy the owner's power to use his property. So statutes of limitations or of usury cause a partial or total destruction of previously existing contracts, and to the extent of their action take away the owner's power of use, that is, his power to enforce them through the courts. From these cases it would seem that any act of the State making a lawful use of property *unlawful* is a taking of that element of property which lies in the right of the owner, and is a proportionate taking of property itself, and any act of the State making a lawful use *impossible* is a taking of that element that lies in the power of the owner, and is also a taking of property.³

That the courts have had no basis of real distinction or difference on which to support their decisions in these questions of taking is not to be rashly asserted, even though we think that their expressed reasons are at fault. An examination of the authorities seems to show that generally when the injury has been substantial, the statutes have been held unconstitutional; but when it has been only slight they have been sustained.⁴ In one case⁵ it has been said that the injury must be direct, not remote or consequential, in order to invalidate the statute. Either of these views leaves the question so much to the individual judg-

¹ *Pumpelly v. The Green Bay Co.*, 13 Wall. 166 (1871).

² *Rideout v. Knox*, 19 N. E. Rep. (Mass.) 390 (1889).

³ See 1 Hare, Const. Law, 383-5, for cases illustrating this distinction. The learned author seems almost to have perceived that there are these two elements in property. He certainly states and illustrates most excellently the rule laid down in the text above: "For as property is a right to the entire or partial use, occupation, or enjoyment of some specific thing, it may be taken *either by abrogating the right, or so dealing with the thing that the right cannot be beneficially executed or enjoyed*. A man's property is taken when his horse is carried away by a trespasser, or for the service of the government in time of war; but it is also taken when his goods or chattels are forfeited for felony or treason, as soon as the sentence is pronounced, and before the writ is issued to carry it into effect." *Ibid.*, p. 283. (The italics are mine.)

⁴ *Wynehamer v. The People*, 13 N. Y. 378, 487-8 (1856). Cf. *Bartemeyer v. Iowa*, 18 Wall. 129, 133 (1873); *Munn v. The People*, 69 Ill. 80, 89 (1873); *Mugler v. Kansas*, 123 U. S. 623, 668-9 (1887); *Rideout v. Knox*, 19 N. E. Rep. (Mass.) 390 (1889), expressly put on that ground.

⁵ *Mugler v. The State*, 29 Kans. 252, 273 (1883).

ment of each court as to afford an ample explanation of the wide divergence of actual decision.¹

There is one class of cases, however, that forms an exception to the rule that regulation is a taking, and those are cases where the law is a command, not a prohibition; where the owner is put under a positive duty. If he is required to make certain specified uses of his property, if, for example, as an abutter on a highway, he is required to keep his sidewalks free from snow, he is not deprived of his property unless the duties so imposed are inconsistent with other uses of it, or unless obedience to the law requires expenditure of money or materials. A law of the latter kind is one requiring railroad companies to build and maintain cattle-guards at farm-crossings.² These cases and those which come under the head of taking or destroying seem to exhaust the enumeration of methods by which the State can so impair property as to give any claim for compensation.

II.

The definitions of the police power are nearly as numerous as the writers or judges who have attempted to define it. The general criticism to be made against them all is that they do not seem to be based on any well-defined criterion by which to test the cases as they arise. In view of this criticism we must try for ourselves to find such a criterion, and it will be found, I think, not in the mode of a State's activity, but in the object; not in the means, but in the end.

In all forms of government the object appears to be twofold, to secure the general safety and to provide for the general welfare. In pursuance of the first object, the State protects itself and its citizens against human wrong-doing and physical danger. In pursuance of the second it does all that it deems proper for the purpose of providing the general facilities of life, and of elevating the general standard of living. The first is the outcome of the natural tendency of sociable animals to band together for the sake of mutual protection. The second is an extended use of the principle of coöperation. The two purposes together include all the functions of government apart from those pertaining to its

¹ Compare with *Wynehamer v. The People*, 13 N. Y. 378 (1856), *Mugler v. The State*, 29 Kans. 252 (1883).

² *Thorpe v. R. R. Co.*, 27 Vt. 140 (1855).

own organization.¹ They differ so fundamentally in their scope that they should be regarded as the foundation of two distinct powers. For one of them, the one acting for the general welfare, we have no one name, and in default of a better it may be called the coöperative power. The other, the power that preserves the general security, is the police power, which, to bring out the contrast between the two more strongly, may be called the protective power.

The scope of this definition will appear on comparison with others. In the famous "Passenger Cases"² Wayne, J., thus defines it: "Police powers, then, and sovereign powers are the same, the former being considered so many particular rights under that name or word, collectively placed in the hands of the sovereign." The learned judge seems to consider the police power coextensive with sovereignty. That is a consistent and perfectly possible definition; but it is open to the objection that it includes too much. In fact it includes the whole, and thereby deprives us of a concise and useful name for a part.

The power is sometimes said³ to extend to the establishment of highways, postal and telegraph systems, and similar government institutions. These forms of governmental activity, however, do not rest on any basis of protection, either to the State or to its citizens. They rest on the power of the State to provide for the general welfare by giving to the public increased means of communication. Any definition which includes so much must, in consistency, include the whole coöperative power. But, as has already been said,⁴ the general welfare and the general security comprise together the whole purpose of government, and if the police power is so far extended as to be coterminous with that, we must say with Wayne, J., that it is identical with

¹ Bluntschli makes the same distinction; but he fails to see that, with the exception stated above, it exhausts the forms of governmental power. "In dem Begriffe der Polizei lassen sich wohl zwei Hauptrichtungen desselben unterscheiden, die eine *negative*, welche den drohenden Schaden abwendet und die Hindernisse der freien Bewegung entfernt, die andere *positive*, welche das Gemeinwohl fördert. Die erstere *conservirende* hat man dann *Sicherheits*-, die zweite *productive Wohlfahrts-polizei* genannt." Lehre vom Modernen Stat, vol. ii., p. 280. For the criticism of this view, see below, n. 3.

² 7 How. 283, 424 (1849). Cf. "License Cases," 5 How. 504, 583 (1847), *per* Taney, C. J.

³ Bluntschli, Mod. Stat., vol. ii., p. 542. Cf. *ibid.*, p. 276 (translated in Tiedeman, Pol. Pow. 3-4) and p. 280 (quoted above, n. 1).

⁴ *Ante*, p. 193-94.

sovereignty.¹ That definition, therefore, is also open to the objection of including so much as to lose its value.

Another definition² bases the police power on the maxim *sic utere tuo ut alienum non laedas*, which limits it to protection against invasions of rights and excludes dangers of non-human origin. The right to restrain the erection or the maintenance of a nuisance, however, seems to be identical with the right to build lighthouses and breakwaters, or to establish drainage systems and the signal service.

The maxim *salus populi suprema lex* is also said to be the foundation of the police power;³ but it is open to the objection that it fails to include a number of cases that are generally recognized as manifestations of that power. The cases to which I refer are those where the State assumes the functions of an arbitrator between individuals, and for the purpose of reconciling conflicting interests, establishes such rules as it deems equitable. The justification of the State for legislation of this character is to be found in the private needs of the parties most concerned, and not in any supposed interest of the public. That the public have some interest, however, in such action by the State is not to be wholly denied; but it is a very remote interest, and is only the general necessity of maintaining peace and quiet among individuals. A most typical instance is a bankrupt law, by which creditors of the same debtor who could not all be paid in full are required to submit to partial payment in proportion to their claims. That is also the principle of *Head v. Amoskeag Manufacturing Co.*,⁴ sustaining the validity of the so-called Mill

¹ *Ante*, p. 194.

² Tiedeman, *Pol. Pow.* § 1. See also *Cooley*, *Const. Lim.* (5 ed.) 706; *Comm. v. Alger*, 7 Cush. 53, 84-5 (1851), *per Shaw*, C. J.

³ *State v. Noyes*, 47 Me. 189, 211-12 (1859); *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 194 (1873).

⁴ 113 U. S. 9 (1884). Gray, J., states the principle very well at p. 21. Mr. Lewis, in his recent book on *Eminent Domain*, § 183, strongly objects to the doctrine of that case. His argument is that the statute in question authorized the defendant to take the plaintiff's property, and that there can be a taking only under the power of eminent domain for a public use. A public use he defines (§ 165) as a use by the public. Since the defendant was a purely private corporation, on Mr. Lewis's assumptions, the argument is complete. The answer to it is that the State may, and frequently does, take property under the police power. Indeed it is the logical outcome of the theory of this essay that the phrase, "power of eminent domain," is merely a convenient term for certain forms of activity of the State, leaving the activities themselves to be classified according to their objects. If land is taken for purposes of protection, *e. g.*, to establish a system of sewers, it is taken

Acts, which authorize the building of dams for the sake of the water-power, even though the estates of upper riparian owners are thereby flooded. It is obvious that unlimited use of flowing waters is not open to all, and to prevent the inevitable conflicts that would otherwise arise, the Legislature, in these acts, makes an allotment of uses among those concerned.

Head *v.* Amoskeag Manufacturing Co. is to be carefully distinguished, however, from *Wurts v. Hoagland*,¹ which the court put on the same ground.² In that case a statute provided that any tract of marshy land within the State should be drained by the State upon the application of at least five owners of lots included in the tract, and that the expense should be apportioned among all the owners of such lots, in proportion to the benefit derived. There was no conflict of rights among the various proprietors in *Wurts v. Hoagland*, as there certainly was in *Head v. Amoskeag Manufacturing Co.* No one of them interfered in the least with any use or improvement by the others of their estates, and there was in fact no dispute to settle. The State, however, undertook to compel the owners, primarily for their common benefit, and only secondarily, and very indirectly, for the advantage of the general community, to join in improving their own property. It was, in truth, an exercise of the coöperative power precisely analogous to the exercise of the police power in *Head v. Amoskeag Manufacturing Co.* It was, however, a most arbitrary and despotic act, because the element of direct public advantage, which was very essential (and therein lies the distinction between the two cases) was wholly lacking. Except for the direct benefit of the whole community no man should be compelled to improve his estates against his will.³

III.

The Constitution of the United States, in the Fifth Amendment, says, "nor shall any private property be taken for public use without compensation;" but by the well-known rule of interpre-

under the police power; but if it is taken for the purpose of securing the public convenience, as for a highway, it is taken under the coöperative power. So of the power to tax, and the war power. War for conquest is coöperative; war in self-defence is protective. Cf. 2 Hare, *Const. Law*, 907-8.

¹ 114 U. S. 606 (1884).

² *Ibid.*, p. 614. Cf. *Hagar v. Reclamation District*, 111 U. S. 701 (1884).

³ *Tillman v. Kircher*, 64 Ind. 104 (1878).

tation, since the States are not named in it, it limits only Federal power.¹ They have all, however, with the single exception of North Carolina,² adopted substantially similar provisions. The question, therefore, as to the rights of owners where no such clause has been embodied in the constitution is of small practical importance. As a theoretical matter their rights would depend on the power of the courts to declare a statute unconstitutional for conflicting with the higher law of personal rights and liberties. The better opinion seems to be that the courts have no such power.³

Judge Hare⁴ strongly urges the view that the constitutional prohibitions are intended to restrain prospective as well as retro-

¹ *Barron v. Baltimore*, 7 Pet. 243 (1833).

² For a complete collection of constitutional provisions on this point, see Lewis, *Em. Dom.* §§ 14-52 (1888). The law of North Carolina seems to be in a very uncertain condition. In an early case an act of assembly which repealed an act granting "all the property that has heretofore or shall hereafter escheat to the State" to the University of North Carolina, and which took back all escheated property that had not been legally sold by the University, was held void as repugnant to the 10th section of the Bill of Rights, which declared that "no freeman ought to be . . . deprived of his life, liberty or property, but by the law of the land." *Trustees v. Foy*, 1 Murph. 58 (1805). In another case, not later than 1814, the court said that an act emancipating slaves in accordance with the expressed desire of their deceased owner, but against the will of the administrator, was "too plainly in violation of the fundamental law of the land to be sanctioned by judicial authority," in reference perhaps to the same clause in the Bill of Rights. *Adm'r of Allen v. Peden*, 2 N. Car. L. Repos. 638. In neither of these cases was the question of compensation touched upon by the court, though in the first it was brought up in the argument of counsel. In *R.R. Co. v. Davis*, 2 Dev. & Bat. 451 (1837), there was a statute which authorized the plaintiff to take land for its road-bed, and provided that it should give compensation therefor. The court took the position that they would not decide whether compensation was rendered necessary by the constitutional phrase, "law of the land," but that *assuming it to be necessary*, the statute in question was not unconstitutional for failing to compel the railroad to pay for the land before it was taken. This precise position was also taken in a comparatively recent case, *State v. McIver*, 88 N. Car. 686 (1883), citing *R.R. Co. v. Davis*. These four decisions are all that I have been able to find on this point.

³ Lewis, *Em. Dom.* § 10, and authorities cited. Judge Hare defines eminent domain to be "a right to provide for the common defence and the general welfare by purchasing such property as is specifically requisite for these ends, without the consent of the owner, and at a price set, not by contract, but according to certain general rules." 1 Hare, *Const. Law*, 333. He therefore thinks that "compensation is a correlative, without which the right to take private property for a public use would be tantamount to confiscation, and would consequently be due if there were no constitutional guaranties." *Ibid.*, p. 347; cf. pp. 348-9. Granting for the sake of argument that it is confiscation, whence does the court derive its power to prevent it, except from a clause declaring confiscation unlawful, or from one expressly investing the power in the court?

⁴ 2 Hare, *Const. Law*, 776-8.

spective legislation. "A law consigning children thereafter born to servitude would be as much a deprivation as if it applied to the existing generation. Such an abuse is impliedly forbidden by the Fourteenth Amendment, as well as by the express terms of the Fifteenth; and the principle applies to every enactment which impairs the rights which those clauses are designed to secure."¹ It is at least doubtful, however, whether the courts would recognize his contention. Miller, J., in *Bartemeyer v. Iowa*,² expressly distinguishes these two forms of statutory action. "The weight of authority," he says,³ "is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating, and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property." Whether Judge Hare's construction is applicable generally, however, is a question apart from this subject; but it is obviously inapplicable to the provision for securing compensation; because there can be no measure of damages. We cannot estimate pecuniarily the value of a mere possibility of acquisition.

IV.

The question which is the subject of this essay may now be stated in this form, How far is a State, in the retrospective action of its protective power, released from the duty of providing compensation for owners of property which it has taken? It may be divided into two parts, the first comprising those cases where the State acts in defence of the individual as an individual; the second consisting of those where the safety of the community as a whole is the object.

1. It is the duty of the State to protect its citizens. That is the return it makes for the allegiance it demands from them. It is unnecessary, therefore, to look for any direct public advantage arising from the performance of this duty, and, indeed, there might be cases where the interests of the public would suffer from every standpoint, but that of moral obligation. In general,

¹ 2 Hare, Const. Law, p. 778.

² 18 Wall. 129 (1873).

³ *Ibid.*, p. 133.

when the constitutionality of State interference in private matters has been upheld, the courts have put it on the ground of public safety or convenience ;¹ but, probably, it would be nearer the truth to make justice between the parties, the real test.² That the question is not one of the public interests is evidenced by the fact that, in all the cases under this head of our subject, compensation, when that is necessary, is given, not by the State, but by one party to the other.

When the act of the State is a perversion of justice, its unconstitutionality can be declared only indirectly and through particular clauses in the constitution. That clause which secures compensation is in terms only applicable when the taking is for a public use ; but these cases, where the taking is strictly and literally for a private use, can properly be brought within its limitation, on the principle that the greater includes the less. If property cannot be taken for a public use without creating a right to compensation, it surely cannot be taken for a private use without creating the same right.

The first and most obvious care of the State is to secure to each citizen a remedy for past invasions of his rights. To this end it establishes courts of law and of equity, with the various remedies that each offers. When equity compels specific performance, or declares the defendant a constructive trustee of a specific *res*, it does not deprive him of his property. The decree rests on a right of the plaintiff, higher in the sight of the court than that of the defendant. When, however, the question is not of specific property, but of pecuniary payments, different considerations may arise. If, in a given transaction, the defendant has made profits which the court thinks should go in whole or in part to the plaintiff, as having a better right, the principle is the same as in the case of specific property. As between the two, the profits belong to the plaintiff. In the case of damages, however, there is a taking, a decrease of the private property which the defendant had before he transgressed the plaintiff's rights. Especially is this true in the case of exemplary damages, or of recovery in *qui tam* actions ; but assuming such judgments to be constitutional on other grounds, of which there may sometimes

¹ *State v. Noyes*, 47 Me. 189, 212 (1859).

² *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 21 (1884).

be doubt,¹ the question of compensation can never arise, for obvious reasons.

Damages are a recompense for a past wrong. The prevention of future wrong may also involve a taking of property, as in the abatement of a private nuisance. If it is a nuisance by pre-established law, the owner is not entitled to compensation for its destruction. It was wrongful in its inception, and equally wrong in its continuance. The circumstances are very different, however, if a person has built a structure which is subsequently declared by statute to be a private nuisance. In one case it has been held that the statute was not unconstitutional, even though it made no provision for compensation to the owner.² The statute in question enacted that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying owners or occupants of adjoining property, shall be deemed a private nuisance," and then gave a remedy by abatement. It must be admitted that the rights of the owner of the nuisance are at a minimum, because his act was the result of a most malicious intent. Nevertheless, he has been keeping strictly within the bounds of his lawful power. It is to be remembered, too, that the statute had to do with no public interests; it dealt merely with the private relations of individuals. Its effect was to destroy one man's property for the benefit of another, and it could be justified only if it worked strict justice between the two. That the taking was proper there can be no doubt; but compensation was necessary to prevent injustice.

There is another class of cases, already adverted to, where there is a conflict of interests among individuals, and the State assumes to act as arbitrator. The conflict is due to an impossibility that all should use their full rights and powers on the same thing, or at the same time. The State cuts the knot of the difficulty by reducing the rights of all evenly, or, if that is impossible or not conducive to justice, by giving one greater rights than the others on condition of his indemnifying them.

¹ See *Koerner v. Oberly*, 56 Ind. 284 (1877), in which exemplary damages in a civil suit, when the defendant was also criminally liable, were held unconstitutional, as putting him twice in jeopardy for the same offence.

² *Rideout v. Knox*, 19 N. E. Rep. (Mass.) 390 (1889). The court admit the full consequences of their decision, but go on to say that "the case is not so hard as it seems," and mention certain mitigating circumstances.

A bankruptcy law is a case of the first kind, — a case of even reduction. It would be valid, even in its retrospective action, although it should make no provision for compensation to any of the creditors. It is not the duty of the State to pay damages, because it is not the duty of the State to guarantee private debts. No one of the creditors can be put under obligation to indemnify the others, because no one of them has received an undue advantage. So, in a partition suit, if the land is divided equally among the co-tenants, or, if it is sold and the proceeds so divided, none of them has any claim against the rest.

In the majority of cases, however, a preference is given to one or the other of the persons interested, and whoever receives it must pay for it. This principle is in practice rarely violated. Thus in a partition suit, if the land cannot be divided equally, it will be set off to any one of the co-tenants who is willing to pay for it, and he must reimburse the rest.¹ In *Head v. Amoskeag Manufacturing Company*,² where the right to use flowing water was given to the company at the expense of the riparian owners, indemnity to them was secured, and without it, the statute would undoubtedly be held unconstitutional.

The so-called Watuppa Pond cases,³ recently before the Supreme Court of Massachusetts, may, perhaps, be regarded as involving the same principle. The parties plaintiff had water-privileges of great value on a non-navigable stream, the outlet of the Watuppa Ponds. The city of Fall River had a right to use a limited amount of the same water for municipal purposes, and by the statute brought in question, the Legislature had increased the city's privilege, thereby proportionately depriving the plaintiffs of what they had been entitled to use. The statute provided that the city should be "without liability to pay any other damages than the State itself would be legally liable to pay." In virtue of certain local statutes, the court held that the State owned these waters, and that its permission to the plaintiff to use them conveyed no vested right, and therefore, since the State was not under duty to provide compensation for retracting its permission, the city of Fall River was not liable. The question was

¹ For cases on the partition of land see cases cited in the opinion of Gray, J., in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 21 (1884).

² 113 U. S. 9 (1884).

³ *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548 (1888).

not really one of property, though it has been so treated.¹ The plaintiffs and the defendant had had the use of the water apportioned between them. By the new law a different division of the use was made, whereby the city gained an advantage at the expense of the plaintiff, and justice required that the latter should be reimbursed.

Perhaps failure to give compensation under this rule would *not* be a ground for invalidating a statute of limitations. The plaintiff has a right of action against the defendant; but the defendant can properly demand that he use it in a reasonable time. In order to reconcile these conflicting claims, statutes of limitation are passed which limit the period in which the plaintiff can bring suit. In their retroactive effect they destroy property belonging to the plaintiff, by taking away his right of action. Though they are usually held unconstitutional, as impairing the obligation of contracts,² it might be said that they take property without due process of law. The question of compensation would be immaterial. To require compensation from the defendant would leave him in practically the same position that he occupied before the act was passed. Instead of being liable on the old cause of action, he would be liable to the extent of its value, because it was taken away for his benefit.

2. It is the duty of the State to protect the community as a whole, as well as to protect private individuals; and, in so doing, the public interests are of paramount importance. The constitutional prohibition against taking private property for a public use, without compensation, applies to this part of our subject with strict literalness.

Fines and penal forfeitures involve a taking of property; but compensation to the owner is out of the question. If they are unconstitutional it must be, from the nature of the case, on other grounds.

The community, like individuals, may guard itself against future or continued injury; and this right justifies the abatement of public nuisances. Though the owner is deprived of his property, he has no just claim to damages. He has been a wrong-doer, and the community merely uses its natural right of self-preservation

¹ For a discussion of the nature of the plaintiff's property, *pro* and *con*, see 2 Harv. L. Rev. 195, 316; 3 *ibid.* 1.

² Berr v. Ransdall, 4 Met. (Ky.) 292 (1863).

against him. Similarly the State may seize articles which the owner is likely to use in such ways as endanger the public safety, *e.g.*, gambling tools, or property such as gunpowder, which is in its nature dangerous.¹ In all these cases the owner has been more or less blameworthy, and has forfeited his claim to consideration.

Suppose, however, property becomes dangerous to the community through no fault of the owner, and is destroyed to prevent the danger, as when buildings are blown up to prevent the spreading of fire in a city. Even here it is settled law that the owner is not protected. Senator Porter² well represents the attitude of the courts. "[The constitution of New York] declares that private property shall not be taken without just compensation; while the common law rule protects any individual who has destroyed it in a case of necessity and to arrest a greater impending calamity. It has not been suggested, in the argument on this point, that the constitution has abrogated that rule; nor do I perceive how the rule can be impugned." It will be noticed that the learned Senator did not understand that there might be a taking which was justifiable in itself, and which would at the same time render the State liable to a claim for compensation. He thought that because the State could destroy the property, it could destroy it without paying for it. The following historical explanation of his assumption is put forward tentatively. The earliest case in this country involving the principle in question was *Sparhawk v. Respublica*³ in 1788, where, during the Revolution, the colonial government took the plaintiff's property and carried it away to a place of safety to prevent the British troops from seizing it. It was seized by them, however, where it was deposited, and the question was whether the plaintiff could get compensation. The court decided the question against him, citing many English cases in support of their judgment. That decision and its citations seem to have been the basis of our present law. The authorities on which the judges relied were all cases of trespass in which the question was whether the defendant was a tortfeasor for destroying or injuring the plaintiff's property for the sake of protecting himself or the community. To hold that he

¹ For a good statement of the theory of forfeitures and seizures see the opinion of Shaw, C. J., in *Fisher v. McGirr*, 1 Gray, 1, 27 (1854).

² *Russell v. Mayor of N. Y.*, 2 Den. 461 (1845).

³ Dall. 357.

was a tort-feasor was to deny in effect the right of self-preservation, and that the courts with perfect consistency refused to do. So far as I know, no action was ever brought to try the question whether the defendant, admitting him not to be a tort-feasor, was yet under a duty to indemnify the plaintiff for the loss he had innocently caused. It seems to have been tacitly assumed that because he was not liable in tort, he was not liable at all, even in an action where tort played no part. That tacit assumption has been transmitted in this country into the great constitutional rule that if the State is justified in taking without due process of law, it may also take without giving compensation, — a rule that seems to be well-nigh universal.¹

A case which really presents the same question arises under the retrospective action of laws declaring certain trades or occupations to be dangerous to the public health or morals and prohibiting them as public nuisances. Has the owner of property invested in such a trade any right to compensation when he has been forbidden to continue it and his property has been forfeited or reduced in value? That the State is justified in taking such measures cannot be denied, and the power has been sustained by the courts in an almost endless line of decisions. It is equally well settled that there is no necessity of giving compensation, though there are *dicta* to the contrary.² The courts have usually avoided the difficulty by declaring that such statutes merely regulate the use of the property, and do not amount to a taking;³ but sometimes the question has been squarely met and compensation has been denied.⁴

While the law seems to be general that for a destruction of property in the interests of public safety, the owner has no claim to reimbursement, it seems to be equally well recognized that when the State uses property, or takes it intending to use it, for such purposes, compensation must be rendered.⁵

The distinction which the courts have established between

¹ For cases on destroying buildings to arrest a conflagration see 2 Hare, Const. Law, 907, n. 3. Cases on destroying property under imminent danger from hostile troops are collected in the opinion in *U. S. v. Pac. R.R.*, 120 U. S. 227 (1886).

² *Bartemeyer v. Iowa*, 18 Wall. 129, 136 (1873).

³ *Mugler v. Kansas*, 123 U. S. 623 (1887).

⁴ *People v. Hawley*, 3 Mich. 330 (1854).

⁵ *Mitchell v. Harmony*, 13 How. 115 (1851). That the taking was for an intended use see p. 135; *U. S. v. Russell*, 13 Wall. 623 (1871); *Dooley v. City*, 82 Mo. 444 (1884).

destruction and appropriation is, I believe, without an exception; but it does not seem to be founded on any principle of sound justice. In all these cases property has been taken for the public good, and the mode of the taking would seem to be immaterial. The owner has been guilty of no legal wrong, and his property should not be confiscated. The community should pay for the benefit it has received at his expense.

It remains to consider those cases where the owner is put under a duty to use his property in specific ways. As has been said already, unless such a regulation prevents the property from being otherwise employed, or unless it compels an expenditure of money and materials, it is not a taking, and no question of compensation can arise. Such a statute as one requiring steam-engines to blow whistles within a certain distance of every crossing¹ gives no claim to indemnity. The cases within the exception, however, might possibly raise a doubt. Laws necessitating expenditure in order to secure safeguards against the dangers incident to the owner's business seem to have been passed most frequently with reference to railroads. It seems to be admitted² that the State can compel the railroads to respond in damages for every accident due to failure to comply with the statutory requisitions. If they are thus punished for their neglect, they can hardly be entitled to indemnity if they obey. That seems to be just. Whoever under takes a business dangerous to others should see at his peril that they are not injured. In this class of cases compensation is not necessary, and I think it has never been granted.

Everett V. Abbot.

CAMBRIDGE, 1889.

¹ *R.R. Co. v. Brown*, 67 Ind. 45 (1879).

² *Thorp v. R.R. Co.*, 27 Vt. 140 (1854); *Lewis, Em. Dom.* § 156, and cases cited.

INFRINGEMENT CASES IN PATENT LAW.

THE question, whether a machine infringes the monopoly of a patent, is one of the most important and common questions of the patent law. It is also in many cases most difficult to answer. It is proposed in this paper to give a short review of some of the cases in which the question has arisen. Obviously the process of answering this question consists of two parts; first, construing the patent, that is, finding what machine it covers, and, second, seeing whether the machine in question is such a machine. These two processes, however, are often necessarily or conveniently carried on together.

The first, and by far the most important, point is to find out what has been done in the same line, before the patentee procured his patent, or, in technical language, "the state of the art." A learned judge in England was once asked what, in his opinion, were the three most important requisites to success at the bar. He replied, "The first requisite is animal spirits, the second and third are also animal spirits." So, in constructing a patent, the first question is the state of the art; the second and third are also the state of the art; for, however broad the language of the patent may be, its effect will be limited to that portion of the device described which was new in the art at the time of the alleged invention.¹

Only by knowing what has already been invented in the same line of machinery can it be decided what the inventor in question has really added to the art.²

Of course, the scope of the patent may be limited in other ways; for instance, one who has made an invention occupying a space in the mechanical arts previously wholly unoccupied may yet, by a badly drawn claim, limit himself to a much narrower

¹ *Burden v. Corning*, 2 Fish. 477; *Bruff v. Ives*, 14 Blatchf. 198; *Estabrook v. Dunbar*, 10 Off. Gaz. 909; *Brown v. Selby*, 2 Biss. 457; *Webster Loom Co. v. Higgins*, 15 Blatchf. 446; *Parsons v. Colgate*, 25 Off. Gaz. 203; *Rubber-Coated Harness Trimming Co. v. Welling*, 97 U. S. 7; *Duff v. Sterling Pump Co.*, 107 U. S. 636.

² *Pitts v. Wemple*, 1 Biss. 87.

patent than his invention deserves, because the courts hold that the inventor is bound by what he claims and cannot expand the claim of his patent by showing that he actually invented another and broader invention.¹ But the final and necessary limitation of the construction of the patent, supposing it to be skilfully drawn so as to cover the whole invention, is the extent of invention embodied in devices not previously known to the art.²

One of the important results of finding the state of the art is, to use a Celtic form of expression, to find that there is no art, that is to say, finding that there was no machine previous to the invention in question which did the thing that the invention in controversy does. The invention then becomes what is called a primary or pioneer invention, and is entitled to certain privileges of construction which have been considered in a recent decision of the Supreme Court of the United States, to which further reference will be hereafter made.³

On the other hand, the search into the state of the art may result in showing that other machines for doing the same thing existed previous to the invention in controversy, but that this latter is an improvement in some respects over previous machines, in which case the construction is limited; for it is held that if an invention was merely an improvement on a known machine, the invention, though patentable, would not exclude others from making other improvements on the same machine by the use of a different form or combination, although the second improvements performed the same functions as the first.⁴ Or in other words, a patent for a primary invention covers all modes of producing the new result by any equivalent mechanisms, while a patent for a secondary invention covers only the specific means for effecting the improvement which the patentee specified or its mechanical equivalent.⁵

The peculiar privilege of construction, accorded to the patent involved in the recent decision of the United States Supreme Court above referred to, applies with equal force to all pioneer

¹ *Johnson v. Root*, 1 Fish. 351; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Lehigh Valley Railroad v. Mellen*, 104 U. S. 112.

² *Cases supra*.

³ *Morley Machine Co. v. Lancaster*, 129 U. S. 263.

⁴ *McCormick v. Talcott*, 20 How. 402, 405.

⁵ *Railway Co. v. Sayles*, 97 U. S. 556.

inventions, using this phrase in the sense of a machine for doing a new thing, something that has not been done before.¹

The privilege consists of giving the patent a wide range of construction, to include machines accomplishing the same result by mechanisms which are proper equivalents of the invention ; and it is in the meaning of this word "proper" that the real force of the decision lies. Every patent for however small an improvement on a known machine covers any other machine which is composed of strict mechanical equivalents for the devices described in the patent.² But it is evident that the narrower the invention, the fewer forms of infringing machines will be found. It is like any defining process. Thus, take the phrase "a man." This would describe any one of the adult male population of the earth. Limit it by the adjective "white," and a much smaller number of persons come under it. Make it a white man residing in Boston, and it will apply to fewer still ; and make it a white man residing in Boston named Ebenezer Jones, and the probabilities are that not more than two or three will be found to whom the phrase applies. It is similar with patents. A patent for a sewing-machine — supposing it to be the pioneer patent — covers a large range. Every one who makes a sewing-machine, acting in the manner described in the patent, is an infringer. Adding a tension to a sewing-machine would cover a smaller number of infringers, and would require a stricter conformity to the mechanism described in the patent. Putting an improvement on the tension, would again be still more limited. The real question which underlies the whole rule as to equivalents is whether the defendant uses the thing that the plaintiff invented, or the equivalent of that thing, however broad it may be.³

The subject of equivalents was considered at length in the Morley case before referred to, and the proposition stated by the court on the point, was substantially to the effect that when a person is the first inventor of a machine which accomplishes a new result, by a combination of mechanisms, another machine is an infringement of the patent therefor, in which such combination of mechanisms exists ; provided that each mechanism, individually considered, is a *proper* equivalent for the corresponding mechanism

¹ Proctor v. Bennis, L. R. 36 Ch. Div. 740.

² Imhaueser v. Buerk, 101 U. S. 655, 656.

³ Crompton v. Knowles, 7 F. R. 199.

in the original invention ; and it makes no difference that in the infringing machine one or more of the combined mechanisms is more simple or different in mechanical construction, so long as they perform each the same function as the corresponding mechanism in the original machine, in substantially the same way, and are constructed to produce the same result.¹

The machines involved in this case were machines for sewing on buttons to the uppers of buttoned boots. Both machines used three mechanisms combined : a mechanism for feeding the buttons one by one to the sewing mechanism, a mechanism for sewing them on to the leather, and a mechanism for feeding along the leather so as to space the buttons as they were sewed on. It was admitted by the defendants' expert that the leather-feeding devices were substantially the same. The case, therefore, turned on the question whether the other two of the three combined devices were equivalents in both machines. The court held that they were,² using the qualifying adverb "substantially."

The important part of this decision may be said to depend upon the use of the words "substantially" and "proper" as quoted above. The words show the tendency of the court to give the patent a broad scope, and perhaps the best account to render of the "pioneer patent" rule would be to say that it is a tendency of the court to find infringement when the machine accomplishes a new result. This tendency was stated by Vice-Chancellor Wood, as follows : "When the thing is wholly novel, and one which has never been achieved before, the machine itself, which is invented, necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object to see whether or not they are merely colorable contrivances for evading that which has been done before. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something which has been known to all the world long before, has a right to extend very largely the interpretation of those means which he has adopted for carrying it into effect."³

When a new machine is invented which accomplishes a new result, it generally is composed of a combination of well-known

¹ 129 U. S., pp. 283, 284.

² p. 286 ad fin.

Curtis v. Platt, 3 Ch. Div. 134, p. 136.

mechanical parts, and the cases above cited turned on the question whether those parts or their equivalents were employed in the infringing machine. It is in this connection that the doctrine of equivalents chiefly comes into play; for when such a machine comes into existence and is successful commercially, the ingenuity of numerous mechanics is put to work to devise machines which will accomplish that new result, and yet not be infringements, or if that is impossible, yet shall not appear to be infringements. Most ingenious shuffling and making of the various elements has been resorted to in many cases, and to any one not trained in picking out the various elements of the machine, the completed structures would seem to differ *toto coelo*; and yet when the working parts are analyzed, it is evident that one machine does exactly what the other does, and by precisely the same means, or their strict mechanical equivalents. The questions that arise as to infringement, are questions of mechanics, and therefore do not strictly come within the limits of a legal discussion. Moreover, the question of infringement being one of fact, and being decided in equity by the judge who hears the case, the legal principles are applied without that definiteness of statement which exists when different tribunals pass upon the law and facts of a case. There are, however, certain principles which have been well settled by the courts. Thus, as has been already said, equivalents in a machine do not take it out of the patent. If a patent covers a combination of three mechanisms, *e.g.*, a sewing mechanism, a feeding mechanism, and a mechanism to supply buttons to be sewed on,—as in the Morley case above referred to,—any machine which has such mechanisms is an infringement, although it does not employ precisely the same mechanisms, but does employ mechanisms which are equivalent in their action and results,¹ but a combination of old elements is not infringed by the use of a portion of its mechanism, *e.g.*, if a patent provides for the use of four elements, a machine which effects the same result by the use of three of those elements does not infringe the patent.²

Another well-settled rule is that a machine which is an improvement on a prior patented machine infringes the patent so far as it

¹ *LeBaw v. Hawkins*, 6 Off. Gaz. 724; *Atlantic Giant Powder Co. v. Goodyear*, 13 Off. Gaz. 45; *Potter v. Schenck*, 1 Biss. 515.

² *Cross v. Livermore*, 21 Off. Gaz. 139; *Bell v. Daniels*, 1 Bond, 212; *Bridge v. Brown*, 1 Holmes, 205; *Brooks v. Fiske*, 15 How. 212; *Dunbar v. Myers*, 94 U. S. 187.

uses that patented mechanism, although by its improvements it produces a better result.¹

Such a case as this, however, raises an important question as to the damages recoverable, for, if the sale of the machine has depended largely upon the improvement, the original patentee cannot recover his usual damages.²

An important rule of construction of patents which affects the question of infringement, has already been alluded to, viz. : that a patentee is held to be bound by the claim of his patent.³

This rule, in spite of its apparent definiteness, is in reality almost worthless on account of its corollary, that a claim must be construed according to the specifications and drawings.⁴

The admission of these additions to the claim puts the question of infringement largely in the power of the court ; for the construction of the claim so enlarged offers a great opportunity for enlarging the scope of a meritorious invention, and narrowing the effect of a mere improvement. In the application of this rule, the effect of the pioneer invention rule appears again, and if the invention is of a machine which performs a new result, the courts are apt to enlarge the construction of the patent. In the *Morley* case, for instance, the patent contained drawings and descriptions of certain definite devices for sewing on the buttons, these devices being needles of a certain form. The claim was simply for sewing appliances ; and the specification also, after describing the needles shown in the drawings, added that these machines were only one form of the different mechanisms which the inventor had contemplated as carrying out his inventions, and specified others, but did not specify the specific devices of the defendant's sewing mechanism. The court said, "That in a pioneer patent, with claims drawn as in the patent in question, the special devices set forth are not necessary constituents of the claim."⁵

Unquestionably, if the patent had only been for an improvement on a machine already known, the court would have held the inventor bound by the devices which he set forth as embodying his invention.

¹ *Stainthorp v. Humiston*, 4 Fish. 107 ; *Frost v. Marcus*, 13 Fed. Rep. 88 ; *Robertson v. Blake*, 94 U. S. 728 ; *Tilghman v. Proctor*, 102 U. S. 707.

² *Garretson v. Clark*, 4 Ban. & Ard. 538 ; *Philp v. Nock*, 17 Wall. 460.

³ *Dennis v. Cross*, 3 Biss. 389 ; *Fisher v. Craig*, 3 Sawy. 69 ; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.

⁴ *Blanchard v. Sprague*, 3 Sumn. 279 ; *Dederick v. Cassell*, 9 Fed. Rep. 312.

⁵ 129 U. S. 284.

This cursory examination of some of the decisions affecting the question of infringement of patents will suffice to show how well the courts have succeeded in arriving at substantial justice in cases which involve the application of legal principles to a wholly new kind of facts, where the main questions are of mechanics, and in most cases, questions calling for the highest degree of mechanical skill, as well as a general knowledge of the state of the mechanical arts. Whether the present method of deciding such questions is the best possible one, seems to be somewhat doubtful, in view of the great additional labor which such cases throw upon the Supreme and Circuit Courts, and a movement has been made in the direction of establishing a court for the especial purpose of trying patent cases, with a limited appeal only to the Supreme Court. Such an arrangement would be regarded with favor by those lawyers whose business is in that line, and would unquestionably advance the speedy trial of these and other cases in the Supreme Court.

Simon G. Croswell.

BOSTON, June, 1889.

THE HISTORY OF THE REGISTER OF ORIGINAL WRITS.¹

III.

LET us pass on to a new reign. Registers of Edward I.'s time are by no means uncommon. I believe that we have at Cambridge no less than seven which, in the sense defined above, may be ascribed to that age, and there are many at the British Museum. The most meagre of them is far fuller than those Registers of Henry III.'s reign of which we have spoken. To give an idea of their size I may mention a MS. at the Museum (Egerton 656), in which the writs are distributed into groups of sixty; there are seven perfect groups followed by a group

¹ In my first article a few misprints occurred which I may be allowed to correct.

On page 99, line 20, for Henry II. read Henry III. I have not seen and hardly hope to see a MS. Register of the twelfth century. The Cottonian MS. referred to on page 110 is Julius D. II. The French words on page 111 should be *a son ascient*. The Cambridge MS. spoken of on page 113 is li. vi. 13.

which contains but fifty-one members ; thus in all there are four hundred and seventy-one writs. This increase in size is of course largely due to the legislative activity of the reign, and this course makes the various specimens differ very widely from each other in detail. Still I think that I have seen enough to allow of my saying that very early in the reign the general arrangement of the Register had become the arrangement that we see in the printed book. A Register of Edward's day is distinctly recognizable as being the same book that Rastall published under the rule of Henry VIII. Not to lose myself in details about statutory writs, I will draw attention to one principle which may help towards a classification of these Edwardian Registers. That principle is expressed in the question — Does Trespass appear at all, and if so where? There are specimens which have no Trespass ; there are others which have Trespass at the end, in what we may regard as an appendix ; there are others again which have Trespass in its final place, namely, in the very middle of the book.

Next I will give a short description of a specimen which I am disposed to give to the earliest years of Edward I. It is contained in a Cambridge MS. (Ee. i. 1) which I will call CC, and the following notes of its contents may be enough. For the purpose of making its scheme intelligible I have supposed it to consist of various groups of writs and have given titles to those groups, but it will be understood that the MS. gives the writs in an unbroken series, a series unbroken by any headings or marks of division.

1. *The Writ of Right Group.* This includes the Writ of Right ; Writ of Right *de rationabile parte* ; Writ of Right of Dower ; *Praecipe in capite* ; Little Writ of Right ; Writs of Peace, and writs summoning the Grand Assize or Jury in lieu of Grand Assize ; writ for viewing an essoinee ; writs announcing appointment of attorney ; *Warrantia diei* ; *Licencia surgendi* ; *Pone* ; *Monstraverunt*.

2. *The Ecclesiastical Group.* Writ of Right of Advowson ; Darrein Presentment ; *Quare impedit* ; *Furis utrum* ; Prohibition to Court Christian in case of an advowson ; Prohibition to Court Christian in case of chattels or debts ; Prohibition against Waste ;¹ Prohibition in case of lay fee. Then follow seven specially worded prohibitions introduced by the note "*Ostensis formis prohibi-*

¹ The reason why Waste gets enclosed in this ecclesiastical group is obvious ; the action of Waste is, or has lately been, an action on a prohibition.

cionum que sont de cursu patebit inferius de eis que sunt in suis casibus formate et sunt de precepto." After these come the *De Excommunicato capiendo* and other writs relating to excommunicates.

3. *The Replevin and Liberty Group.* Replevin; a writ directed to the coroners where the sheriff has failed in his duty is preceded by the remark "*primo inventum fuit pro Roberto de Veteri Ponte;*" *De averiis fugatis ab uno comitate in alium;* *De averiis rescussis;* *De recaptione averiorum;* *Moderata misericordia;* *De nativo habendo*, the limitation is "*post ultimum reditum Domini J. Regis avi nostri de Hibernia in Angliam;*" *De libertate probanda;* Aid to distrain villans; *De tallagio habendo;* *De homine replegiando;* *De minis*, i. e. a writ conferring a special peace on a threatened person.¹ *De odio et atia* (with the remark that the clause beginning with *nisi* was introduced by John Lexington, Chancellor of Henry III.).

4. *The Criminal Group.* Appeal of felony evoked from county court by *venire facias*; writ to attach one appealed of homicide by his body; writs to attach other appellees by gage and pledge.

5. *A Miscellaneous Group.* *De corrodio substracto;* *De balliva forrestarii de bosco recuperanda;* *Quod attachiet ipsum qui se subtraxit a custodia;* *Quod nullus implacitetur sine precepto Regis.* Various forms of the *Quod non permittat* and *Quod permittat* for suit of mill, etc.

6. *Account.* Account against a bailiff ("*Et sciendum est quod filius et heres non habebit hoc breve super ballivum domini [corr. antecessoris] sin, set ut dicitur executores possunt habere hoc breve super ballivum tempore quo fuit in obsequio defuncti;*" it proceeds to give a form of writ for executors in the king's court and then adds, "*Et hoc breve potest fieri ad placitandum in comitatu. Verumptamen casus istorum duorum brevium mere pertinet ad curiam cristanitatis ratione testamenti*").

7. *Group relating chiefly to Easements and the duties of neighbors.* Aid to knight eldest son; *De pontibus reparandis — muris — fossatis;* *De curia claudenda;* *De aqua haurienda;* *De libero tauro habendo;* *De rationabile estoverio;* *De chimino habendo;* *De*

¹ A. has complained that he is threatened by B. therefore "prefato A. de prefato B. firmam pacem nostram secundum consuetudinem Anglie habere facias, ita quod securus sis quod prefato A. de corpore suo per prefatum B." etc. It is a writ directing the sheriff to take security of the peace.

communa, with variations ; Admeasurement of pasture ; *Quo jure* ; *De racionalibus divis*is ; *De perambulacione* ; *De ventre inspiciendo*.

8. *Mesne, Annuity, Debt, Detinue, etc.* *De medio* ; *De annuo redditu* ; *De debito* (only two writs of debt, one a *precipe*, the other a *justicies* ; the former has "*debet et detinet*," the latter "*detinet*") ; *Ne plegii distringantur quamdiu principalis est solvendus* ; *De plegiis acquietandis* ; *De catallis reddendis* ; (*Detinue* by *precipe* and by *justicies*) ; *Warrantia cartae*.

9. *Writs of Customs and Services.*

10. *Covenant and Fine.* The covenant in every case is "*de uno messuagio*."

11. *Wardship.* *De custodia terre et heredis* ; *De corpore heredis habendo* ; *De custodia terre sine corpore* ; *Aliter de soccagio*. "*Optima brevia de corpore heredis ratione concessionis reddende* [sic] *executoribus alicui defuncti*."

12. *Dower.* *Dower unde nihil* ; *De dote assensu patris* ; *De dote in denariis* ; *De dote in Londonia* ; *De amensuracione dotis*.

13. *Novel Disseisin.* Novel disseisin, the limitation is "*post primam transfretacionem domini H. Regis anni*¹ [sic] *nostri in Britanniam*" ; *De redisseisina* ; Assize of nuisance ; Attaint.

14. *Mort d'Ancestor*, and similar actions. *Mort d'Ancestor*, (no period of limitation named) ; *Aiel* ; *Besaiel* ("*Multi asserunt quod hoc breve precipe de avio et avia tempore domini H. Regis filii Regis Johannis per discretum virum dominum Walterium de Mertone*² *tunc secretorium clericum et prothonotorium* [sic] *cancellarie domini Regis et postmodum cancellarium primo fuit adinventum quia propter recentem seisinam et possessionem et discrimina brevis de recto vitandum ab omnibus consilariis et justiciariis domini Regis est approbatum et justiciariis demandatum quod illud secundum sui naturam placitent*") ; *Cosinage* ; *Nuper obiit* ("*Et hoc breve semper est de cursu ad bancum in favorem petentis seisinam quod antecessor petentium habuit de hereditate sua et similiter ut vitentur dilaciones periclose que sunt in breve de recto*.")

15. *Quare ejecit infra terminum*, ascribed to Walter of Merton ;³ *Writs of Escheat*.

¹ The occurrence of this word which may be a corruption of "*avi*" is not sufficient to make us doubt that in substance this Register belongs to Edward I.'s reign ; though possibly a feeble attempt to "*bring it up to date*" may have been made at a later time.

² Walter of Merton seems here to get the credit which on older evidence belongs to William of Raleigh.

³ Here again Merton seems to be obtaining undue fame at the expense of Raleigh.

16. *Entry and Formedon.* Numerous Writs of Entry, the degrees being mentioned (no writ "in the *post*"); Formedon in the Reverter; and a very general Formedon in the Descender.¹

17. *Miscellaneous Group.* License to elect an abbot; petition for such license; form of presenting an abbot elect to the King; pardons; grants of franchises; a very special writ for R. de N. impleaded in the court of W. de B.; *De languido in anno bissextili* (concerning an essoin for a year and a day in leap year); *Breve de recapcione averiorum post le Pone*; *Quod non fiat districtio per oves vel averiis* [sic] *carucarum*; *Ne aliquis faciat sectam ad comitatum ubi non tenetur*; *Ne faciat sectam curie ubi non tenetur*; some specially worded Prohibitions.

In substance this MS. seems to represent the Register as it stood in the very first years of Edward I. I do not think that any of the statutes of his reign have been taken into account, and doubt whether even the Statute of Marlborough (1267) has yet had its full effect. There is no Writ of Entry "in the *post*," and some writs about distress and suit of court founded on statutes of Henry III. still remain unassimilated in a miscellaneous appendix. The character of that appendix provokes the remark that the copyists of the Register may often have picked and chosen from among the miscellaneous forms of the Chancery those which would best suit the special wants of themselves or their employers. The *congé d'élire*, for example, looks out of place, and the petition for such a license still more out of place; but this is a monastic manuscript and these formulas were useful in the abbey.

I said above that Glanvill's scheme of the law, or rather his scheme of royal justice, might be displayed by some such string of catch words as the following: "Right" (that is proprietary right in land), "Church," "Liberty," "Dower," "Inheritance or succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now I will venture the suggestion that the influence of his book is apparent on the face of the Register (CC) and all the later Registers. It begins with "Right" while it puts "Possession,"

¹ "Praecepto R. quod juste," etc., "reddat H. unam virgatam terre quam W. dedit M. et que post mortem ipsius M. ad prefatum H. descendere debet per formam donacionis quam prefatus W. inde fecit predicto M. ut dicit, et nisi fecerint," etc. What I have seen in this and other Registers favors the belief that there was a Formedon in the Descender before the Statute de Donis. See Co. Lit. 19a; Challis, Real Property, 69.

a title which now includes the Writs of Entry as well as the Assizes, at the very end. After "Right" comes "Church," and after "Church" comes "Replevin and Liberty," a title the unity of which is secured by the fact that when a man is wrongfully deprived of his liberty he ought to be replevied. The middle part of the Register is somewhat chaotic, and so it always remains; but it is really less chaotic than it may seem to some of us, whose heads are full of modern notions. We seem indeed to be carried backwards and forwards across the line which divides "personal" and "real" actions; Account, Annuity, Debt, Detinue, and Covenant are intermixed with actions founded on feudal dues and actions founded on easements, writs for suit of mill, suit of court, repair of bridges, actions of Mesne, actions of Customs and Services. The truth, as it seems to me, is that the line between "real" and "personal" actions as drawn in later books, is, at least when applied to our medieval law, a very arbitrary line. For example, there is an important connection between an action in which a surety sues the principal debtor (*de plegio acquietando*) and an action of Mesne, in which the tenant in demesne sues the intermediate lord to acquit or indemnify him from the exaction of the superior lord; this connection we miss if we stigmatize "Mesne" as a "real action" just because it has something to do with land. The action of Debt, again, is founded on a *debet*; but so is the action for Customs and Services, at least in some of its forms. However I am not concerned to defend the Register.

In Edward I.'s day, partly it may be under the influence of Glanvill's book, it has become an articulate body. It will never hereafter undergo any great change of form, but it will gradually work new matter into itself. Such new matter will for a while lie undigested in miscellaneous appendixes, but in course of time it will become an organic part of the system. I will mention the most striking illustration of this process.

Hitherto we have never come across that action of Trespass which is to be all important in later days, and it seems to me a very noteworthy fact that there are Registers of Edward I.'s day that omit this topic. It gradually intrudes itself. First we find it occupying a humble place at the end of the collection among a number of new writs due to Edward's legislative zeal. Thus, to choose a good example, there is in the Cambridge Library a MS. (Ll. iv. 18) containing a Register which is very like that (Ee. i. 1.)

which we have last described. But when it has done with the Writs of Entry, it turns to Formedon, gives writs in the Reverter, Descender, and Remainder, and a number of specially worded writs of Formedon which bear the names of the persons for whom they were drawn:—we have Bereford's formedon, Mulcoster's, and Mulgrave's; clearly the Statute of Westminster II. is in full operation. Then upon the heels of Formedon treads Trespass. It is a simple matter as yet, can be represented by one writ capable of a few variations—*insultum fecit et verberavit, catalla cepit et asportavit, arbores crescentes succidit et asportavit, blada messuit et asportavit, separalem pasturam pastus fuit, uxorem rapuit et cum catallis abduxit*. Trespass disposed of, we have Ravishment of Ward; *Contra formam feffamenti*; *Ne quis destringatur per averia carucae*; Contribution to suit of court; Pardons; Protections; *De coronatore eligendo*; *De gaola deliberanda*; *De deceptione curiæ*; *cessavit per biennium*; *carta per quam patria de Ridal disafforestatur*; *Breve de compoto super Statutum de Acton Burnell*, and so forth and so forth, in copious disorder. The whole *Registrum* fills fifty-two folios, of which no less than the last fourteen are taken up by the unsystematized appendix. Another MS. (Ll. iv. 17) gives a Register of nearly the same date, perhaps of somewhat earlier date, for it does not contain the new Formedons. This again has an unsystematized appendix, and in that appendix Trespass is found. The place at which it occurs may be thus described:—the part of the Register that has already become crystallized, the part which ends with the Writs of Entry, having been given, we have the following matters: Pardon; License to hunt; Grants of warren, fair, market; *De non ponendo in assisam*, Writ on the Statute of Winchester; Leap year; Inquests touching the King's year and day; Contribution; Beau pleader; Trespass; Gaol Delivery; Intrusion; *congé d'élire*; *Quo Warranto*; Trespass again; Writ on the Statute of Gloucester; Mortmain; Trespass again (*pro cane interfecto*); *ne clerici Regis compellantur ad ordines suscipiendos*,—as variegated a mass as one could wish to see. Other MSS. of the same period have other appendixes with Trespass in them. They forcibly suggest that the Register was falling into disorder, the yet inorganic part threatening to outweigh the organic.

There came a Chancellor, a Master, a Cursitor with organizing power; Trespass could no longer be treated as a new action; a

place had to be found for it, and a place was found. It may be that this was done under Edward I. ; certainly in his son's reign it seems an accomplished fact. What was the place for Trespass ? If the reader will look back at our account of the Register which we have called CC, he will find that we have labelled the third group of writs as "Replevin and Liberty," the fourth group as "Criminal." The connection between Replevin and Liberty is obvious, it is seen in the writ *De homine replegiando*, the writ for replevying a prisoner. The transition from Liberty to Crime is meditated by the writ *De odio et atia*, a writ for one who says that he is imprisoned on a false accusation of crime. Now when the time had come for taking up Trespass into the organic part of the Register, this was the quarter in which its logical home might be found. It was naturally brought into close connection with "crime." Throughout the Middle Ages, Trespass is regarded as a crime ; throughout the Year Books the trespasser is "punished ;" and it is a very plausible opinion that the earliest actions of trespass grew out of appeals of felony ; they were, so to speak, mitigated appeals, appeals with the "*in feloniam*" omitted, but with the "*vi et armis*," and the "*contra pacem*" carefully retained. Already in the Register that I have called CB, a writ of false imprisonment has come in immediately before the writ for attaching an appellee. Then, in CC, a writ *De minis* has forced its way into the "Replevin and Liberty Group" so as to precede the writs against an appellee. This writ *De minis*, commanding the sheriff to confer the king's peace, the king's "grith" or "mund" we may say, on a threatened person, and to make the threatener find security for the peace is the herald of Trespass : *De minis*—*De transgressione*, this becomes a part of our "*legalis ordo*."

The result in the fully developed Register is curious, showing us that the arrangement of the book is the resultant of many forces. Let us see what follows Waste. We have the *De homine replegiando*, then the Replevin of chattels, then, returning to men deprived of liberty, the *De nativo habendo* and the *De libertate probanda* ; these naturally lead to the writ ordering the sheriff to aid a lord in distraining his villans. There follows the *De scutagio habendo*. Why should this come here ? Because in older times villanage had suggested tallage ; this had been the place for a *De tallagio habendo*, and then tallage had suggested scutage.

Then in the printed Register we have the *De minis*; and then an action against one who has given security for the peace and has broken it by an assault, brings upon us the whole subject of Trespass, which with its satellites now fills some forty folios, some eighty pages. And then what comes next? Why *De odio et atia*; we are back again at that topic of "Liberty and Replevin" whence we made this long digression. Meanwhile these criminal writs, these writs for attaching appellees which originally attracted Trespass to their quarter of the Register, have disappeared as antiquated, since persons accused of felony now get arrested without the need of original writs.

Similar measures were taken for writing into appropriate places the result of the legislation of Edward I.; but the formation of new writs was constantly providing fresh materials. Some of these found a final resting-place at the very end of the Register, but for most of the statutory writs, a home was found in the middle. The occurrence of the Assize of Novel Disseisin marked the beginning of a new and logically arranged section of the work, a section devoted to Possession. It is between Dower and Novel Disseisin that the newer statutory writs are stored.

As already said, the printed Register is full of notes and queries. Many of these are ancient, some as old as the reign of Edward I. Speaking broadly one may say that the Latin notes are ancient, the French notes comparatively modern. Some of them must have been quite obsolete in the reign of Henry VIII.; but the "*vis inertiae*" preserved them. When once they had got into MSS. they were mechanically copied.

During the whole of the fourteenth century the Register went on growing, and by the aid of MSS. we can still catch it in several stages of its growth. Some of these MSS. show a Register divided into chapters, and thus make it possible for us to perceive the articulation of the book. As the printed volume gives us no similar aid, I will here set out the scheme of a Register which I attribute to the reign of Richard II. It is contained in a Cambridge MS. (Ff. v. 5). In the right-hand column I give the catch-words of its various chapters; in the left-hand column I refer to what I take to be the scheme of CC, the Register from the beginning of Edward I.'s reign, of which mention has already been made.

- | | |
|---|---|
| 1. The Writ of Right Group. | i. <i>De recto.</i> |
| | ii. <i>De recto secundum consuetudinem manerii.</i> |
| | iii. <i>De falso iudicio.</i> |
| | iv. <i>De attornato generali; Protectiones.</i> |
| | v. <i>De attornatis faciendis.</i> |
| 2. The Ecclesiastical Group, including Waste. | vi. <i>De advocacione; De ultima presentacione; Quare impedit; juris utrum.</i> |
| | vii. <i>De prohibitione.</i> |
| | viii. <i>Consultationes.</i> |
| | ix. <i>De non residentia; De vi laica ammovenda, etc.</i> |
| | x. ^(a) <i>Ad jura regia.</i> |
| | xi. <i>De excommunicato capi-endo, etc.</i> |
| | xii. <i>De vasto.</i> |
| 3. Replevin and Liberty Group. | xiii. Replevin generally and <i>De homine replegi-ando.</i> |
| | xiv. Trespass and Deceit (<i>transgressio in deceptione</i>). |
| | xv. ^(b) Error. |
| [4. Criminal Group dissolved.] | xvi. <i>Conspiratio; De odio et atia.</i> |
| 5. [Miscellaneous Group. See cap. xix]. | |
| 6. Account. | xvii. Account. |
| | xviii. Debt and Detinue. |
| 7. Easements, Neighborly Duties, etc. | xix. <i>Secta ad molendinum; curia claudenda; Quod permittat, etc.; Quo jure; Admeasurement of pasture; Perambulation; Warrantia cartae; De plegiis acquietandis.</i> |

(a) A group of especially stringent prohibitions called out by papal and ecclesiastical aggression.

(b) The topic of Error is suggested by Trespass, just as the topic of False Judgment is suggested by "Right."

8. Mesne, Annuity, Debt, Detinue.	xx. Annuity; Customs and Services; Detinue of Charters; Mesne.
9. Customs and Services.	
10. Covenant and Fine. ^(a)	xxi. Covenant.
11. Wardship.	xxii. Wardship.
12. Dower.	xxiii. Dower.
	xxiv. ^(b) <i>Brevia de Statuto</i> (Modern Statutory Actions).
	xxv. <i>De ordinatione contra servientes</i> (Actions on the Statute of Laborers).
13. Novel Disseisin.	xxvi. Novel Disseisin.
	xxvii. <i>De recordo et processu mittendo</i> (Writs ancillary to the Assizes).
14. Mort d'Ancestor, and similar writs.	xxviii. Mort d'Ancestor.
	xxix. Aiel, Besaiel, <i>Nu p e r Obiit</i> , etc.
15. <i>Quare ejecit</i> .	xxx. <i>Quare ejecit; De ejectione firmæ</i> .
16. Entry.	xxxi. Entry <i>ad terminum qui preteriit</i> .
	xxxii. Entry, <i>Cui in vita</i> .
	xxxiii. Intrusion.
	xxxiv. Entry for tenant in dower.
	xxxv. Cessavit.
	xxxvi. Formedon.
	xxxvii. <i>De tenementis legatis</i> .
17. Miscellaneous group.	xxxviii. ^(c) <i>Ad quod damnum</i> .
	xxxix. <i>De essendo quieto de theolonio</i> .
	xl. <i>De libertatibus allocandis</i> .
	xli. <i>De corrodio habendo</i> .
	xlii. <i>De inquirendo de idiota; De leproso amovendo</i> , etc.

(a) The action on a fine by original writ has disappeared, because fines are now enforced by *Scire Facias*. This is noted in the printed Register, t. 169.

(b) Here come two chapters of statutory appendix.

(c) Here begins a long appendix, consisting mainly of documents that may be called administrative.

- xliii. Presentations by the king,
etc.
- xliv. *De manucaptione et
supersedendo.*
- xlv. *De profero faciendo;
De mensuris et ponderibus.*
- xlvi. *De carta perdonacionis
se defendendo.*
- Appendix. *De indemptitate nomi-
nis.* Statutory writs;
Decies tantum, etc.

A Register from the end of the fourteenth century is in point of form the Register that was printed in Henry VIII.'s day. If I might revert to my architectural simile, I should say that the cathedral as it stood at the end of Richard II.'s reign was the cathedral in its final form; some excrescent chantry chapels were yet to be built, but the church was a finished church and was the church that we now see. In the printed book we can detect but very few signs of work done under Tudor or even under Yorkist kings, and though the Lancastrian Henries have left their mark upon it, still that mark is not conspicuous. I should guess that the last occasion on which any one went through the book with the object of adding new writs and new notes occurred late in the reign of Henry VI.¹ On the other hand we constantly find references to decisions of Richard II.'s time, and there are many signs that the book was revised and considerably enlarged in the middle of Edward III.'s reign; allusions to decisions given between the tenth and twentieth years of the last-named king are particularly frequent, and we read more of Parning than of any other chancellor. This is a curious point. Robert Parning, as is well known, was one of the very few laymen, one of the very few common lawyers, who during the whole course of medieval history held the great seal. He held it for less than two years; he became chancellor in October, 1341, and died in August, 1343; yet during this short period, he stamped his mark upon the Register. The policy of having a layman (a "layman," that is, when regarded from the ecclesiastical not the legal point of view) as chancellor was very

¹ Reg. Brev. Orig. f. 12, 21, 58, 288, 289 b, 291, 308, show work of Henry VI.'s reign.

soon abandoned ; few if any laymen were endowed with the statecraft and miscellaneous accomplishments required of one who was to act as "principal secretary of state for all departments." But within the purely legal sphere, as manager of the "*officina brevium*," a great lawyer who had already been chief justice may have found congenial work. After all, however, it may be chance that has preserved his name in the pages of the Register ; just in his day some clerk may have been renovating and recasting the old materials and thus have done for him what some other clerk a century earlier did for William Raleigh.

During the fifteenth century the Register increased in bulk, but except in one department there seem to have been but few additions made to the formulas of litigation ; the matter that was added consisted, if I mistake not, very largely of documents of an administrative kind,—pardons, licenses to elect and other licenses, letters presenting a clerk for admission, writs relating to the management of the king's estates, writs for putting the king's wards in seisin, and so forth, lengthy formulas which conceal what I take to be the real structure of the Register. As a final result we get some seven hundred large pages, whereas we started in Henry III.'s day with some fifty or sixty writs capable of filling some ten or twelve pages. The department just mentioned as exceptional is of course the department of Trespass. Here there has been rapid growth ; but I do not think that the printed book can be taken as fairly representing the law of the time when it was printed, namely 1531. It draws no line at all between "Trespass" and "Case." The writs that we call writs of "Trespass upon the special Case" are mixed up with the writs which charge assault, asportation, and breach of close, and are very few. Writs making any mention of *assumpsit* are fewer still, and I think that there is but one which makes the non-feasance of an *assumpsit* a ground of action.¹ I should suppose that the practice of bringing actions by bill without original writ checked the accumulation of new precedents in the Chancery, and it seems an indubitable fact that the invention of printing had some evil as well as many good results ; men no longer preserved and copied and glossed and recast the old manuscripts. But when all is said it is a remarkable thing that a Register which certainly did not contain the latest

¹ Reg. Brev. Orig. f. 109 b, a writ against one who has "assumed" to erect a stone cross and has not done it.

devices should have been printed in 1531, reprinted in 1595, and again reprinted in 1687. The consequence is that Trespass to the last appears as an intruder. No endeavor has been made to reduce the writs that come under that head to logical order. The forces which have determined the sequence of these writs seem chiefly those which I have called "chronology" and "mechanical chance;" as new writs, as they were made, were copied on convenient margins and inviting blank pages. There has been no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is asportable, while the now well-known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, the unskilful surgeon, the careless innkeeper, creep in slowly amid the writs which describe wilful and malicious mischief, how a cat was put into a dove-cote, how a rural dean was made to ride face to tail, and other ingenious sports. It would be interesting could we bring these Registers to our aid in studying the process whereby Trespass threw out the great branch of Case, and Case the great branch of Assumpsit; but the task would be long and very difficult, because the Registers are so many, and unless we compare all of them our means of fixing their dates are few and fallible. Of course, if the task concerned the history of Roman Law it would be performed; but we are all fully persuaded, at least on this side of the Atlantic, that our own forefathers were not scientific.

F. W. Maitland.

CAMBRIDGE, ENG., 1889.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
HERBERT H. DARLING,	CHARLES I. GIDDINGS,
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
CHARLES E. SHATTUCK,	AARON C. THAYER,
EZRA R. THAYER.	

IN the present number we print an essay by Mr. Everett V. Abbot of the third-year class of 1889. This is the essay to which was awarded the prize of one hundred dollars offered by the Harvard Law School Association.

THE Council of the Harvard Law School Association submits the following report of membership on December 1, 1889. The whole number of members of the Association is 901, representing 38 States and Territories, and distributed as follows:—

Alabama,	3	Maine,	12	Rhode Island,	9
Arkansas,	1	Maryland,	8	Tennessee,	2
California,	15	Massachusetts,	467	Texas,	5
Colorado,	13	Michigan,	11	Vermont,	2
Connecticut,	9	Minnesota,	12	Virginia,	2
Dakota,	3	Mississippi,	1	Washington,	1
Delaware,	4	Missouri,	22	West Virginia,	2
Dist. Columbia,	19	Montana,	2	Wisconsin,	7
Georgia,	3	Nebraska,	1	New Brunswick,	12
Illinois,	27	New Hampshire,	9	Nova Scotia,	6
Indiana,	4	New Jersey,	3	U. S. of Colombia,	1
Iowa,	4	New York,	119	France,	1
Kansas,	1	Ohio,	51	Austria,	1
Kentucky,	6	Oregon,	1	Japan,	2
Louisiana,	1	Pennsylvania,	16		
					901

The membership roll comprises the names of more than one-fourth of the whole number (3,218) of former students of the Harvard Law School known to be living, and includes representatives from the classes of 1829, 1831, 1833, 1835, and from every class from 1838 to the present time.

Since October 15, 1889, there has been an increase in the membership of 53.

MR. P. EDWARD DOVE in the second edition of his pamphlet, "Public Rights in Navigable Rivers," takes occasion to answer some criticisms which were made upon the first appearance of this monograph and to reiterate his proposition with force and clearness. The pamphlet was called forth by two English decisions¹ in which it was held that the public had no right of fishing in non-tidal waters though such waters might be navigable. Mr. Dove's purpose is to show that the present course of decisions in England relative to public rights in navigable rivers is not in accord with the early English law. By a very careful examination of the Hundred Rolls and the Year Books he shows that formerly "every river that was in fact navigable for ships or boats was a public river and a highway," and his conclusion is that as the public has the right of way it has necessarily the right of fishing, that the two rights, in other words, are concurrent and coexistent. That these two rights do exist together in the case of tidal waters in both England and the United States, and that they usually so exist in the case of non-tidal and navigable waters in the United States is unquestionably true, but must they *necessarily* exist together? For instance in many of our states there is a public right of way over streams which can only be used for the floating of logs, but would it not be going pretty far to say that because a man can drive his logs down a certain stream at the time of the spring freshets he has the right to fish for trout in that stream? In an elaborate judgment of the Special Commissioners for English Fisheries² this point is considered, and the following extract is quoted from that judgment:—

"In some rivers there are five to thirty miles of this navigable water which are not tidal, and in all that portion of the river the rule is that the public have the right of passage in boats and vessels, but have no right to catch fish. While navigating this part of the river, the public have no more right to dip a net or cast a fly than a passenger along the highway has a right to catch the game or dig the mines there. . . . The public right of navigation and the public right of fishing are entirely separate rights. They are not concurrent rights, except in the sea and tidal parts of the river; and even there it is well settled that, if the rights clash, the fisherman must give way for the navigator, the right of navigation being the paramount right."

We must doubt, therefore, on principle and on authority the correctness of Mr. Dove's inference.

PROPRIETORS of patent medicines will find in a very recent decision of the Supreme Court of Georgia, *Blood Balm Co. v. Cooper*,³ matter for serious consideration. It is there decided that when a patent medicine is put on the market and accompanied by directions for its use, and it is shown to contain poisonous matter enough to injure a person who takes the dose as directed, the proprietor is liable for the injury. The opinion states that the court has been unable to find any reported case in which this point arose, but the conclusion is reached on principle, that the defendant is liable. The company relied on the fact that they had had no dealings with the plaintiff, who had purchased the "Balm" from a druggist; but the defence was unsuccessful, as it

¹ *Murphy v. Ryan*, 2 Ir. R. C. L., 143; *Pearce v. Scotcher*, 9 Q. B. D. 162.

² Annexed to *Leconfield v. Lonsdale*, L. R. 5 C. P. 657, 665.

³ 10 S. E. Rep. 118.

was pointed out by the court that the liability did not arise by contract, and that the circumstances of this case, where a medicine was prepared for public sale, distinguished it from the case where a gun or dangerous machine is sold to one person and by him delivered to another.

THE recent refusal of the judges of the Supreme Court of Massachusetts¹ to answer the questions of the House of Representatives is worthy of notice. The constitution of this state² contains the following clause; "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions;" and in accordance with this clause the opinion of the justices has frequently been asked, the court always recognizing — what the daily press is apt to forget — that such opinions are of a merely advisory character and do not have the force of decisions. On a previous occasion³ the court declined to answer questions, on the ground that they related to matters of judicial administration not subject to legislative or executive control. The ground for their refusal in the recent case — where the question related to the interpretation of a statute in regard to the means of education which a parent is required to provide for his child⁴ — is substantially that there was no "important question of law" or "solemn occasion" within the meaning of the constitution. The judges seem inclined to limit the application of the clause to cases in which the branch of the government requiring the opinion is in doubt as to the extent of its power and authority and wishes to be enlightened on the subject; at any rate they do not regard the question before them, though "propounded with a view to further legislation," as coming within "a reasonable construction of the constitution."

The provision in our constitution for requiring the opinions of the justices was evidently derived, as has been pointed out,⁵ from the practice in England by which the king, as well as the House of Lords, had the right to call for the opinions of the judges. Provisions similar to, and suggested by, those of the Massachusetts constitution have appeared in the constitutions of some other states;⁶ in one of these the extraordinary statement has been made by the court that its opinion had the binding force of a decision.⁷ In Missouri, under a clause of this kind in the constitution of 1865, the judges repeatedly refused to give their opinions, and after ten years were relieved from the duty. In Colorado, also, a provision for requiring the opinion of the court was a few years ago introduced into the constitution;⁸ but the legislature seems to have turned in on the judges so many and so various interrogatories

¹ Answer of the Justices, 148 Mass. 623.

² Const. Mass., Part II., ch. 3, art. 2.

³ 122 Mass. 600.

⁴ The American Law Review, Vol. 23, p. 664, seems to be under a misapprehension in supposing that the questions in this case had anything to do with "testing the constitutionality of laws in advance." The language of the court indicates that such a question might receive a different treatment; they expressly say (148 Mass. 625-6) that it is a "solemn occasion" when either branch of the legislature have "serious doubts as to their power and authority" in regard to intended action.

⁵ 126 Mass. at p. 561.

⁶ See a "Memorandum on the Effect of Opinions Given by Judges," by Professor Thayer. Such a provision is to be found in the constitution of the new state of South Dakota.

⁷ 70 Me. at 583.

⁸ Const. Col., Art. 6, Sec. 2.

that they have recently protested against the too extensive use of the power, and emphasized their protest by refusing to answer the particular question proposed.¹ This court also, but for peculiar reasons, seems to claim a judicial quality for these opinions.

The court has undoubtedly the right to decline answering an inquiry which is obviously and beyond question not within the terms of the constitution; but subject only to this qualification it would seem that the importance of the question and the solemnity of the occasion are points which the constitution has left for the legislature to decide. In view of this fact and of the great consideration which may well be expected in the dealings between the highest legislative and judicial tribunals, it may be a question whether the recent action of the Supreme Court was not somewhat strong. At any rate the House of Representatives seems to have acted properly in putting on record its dissent from the conclusions of the justices.

In the *Nation* of September 12th there is a communication on "English Woman-Burning" in which the writer mentions an instance of that punishment in a case of petty treason in 1775. The item was taken from the *Yorkshire Notes and Queries*, and the editor of that journal speaks of the occurrence as "the last case of burning to death probably." But Mr. Pike, in his very valuable *History of Crime*,² mentions two later instances, the last case being that of a woman who was burned as late as 1784 for the murder of her husband. Not long after this time the punishment of hanging was substituted by statute for that of burning.

This horrible punishment is brought nearer home when we recall the fact that in 1755 an old negro woman was burned in this city on the common opposite the college for poisoning her master.³

In the recent English case of *Gardner v. Bygrave*, which was an action of assault and battery brought by a pupil against his school-master for caning him on the hand, Mr. Justice Mathew made a joke which the *Saturday Review* regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by a really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *à posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have inquired into the plaintiff's employment. "If he worked with his hands, such a punishment might seriously interfere with his occupation. Punishment might be inflicted elsewhere" — whereupon the court asked, — "what if his occupation were sedentary?"

It was ultimately decided that caning on the hand, when properly done and for a proper reason, is lawful.

¹ 21 Pac. Rep. 478.

² II., 379.

³ See a pamphlet entitled "The Trial and Execution of Mark and Phillis," by A. E. Goodell, Jr., published at the University Press in 1883.

in the American cases, but their tendency seems to be opposed to the view of the House of Lords. See *Cooley*, Torts, 501 and cases there cited. For a very able discussion of the principal case, see an article by Sir Frederick Pollock, in 5 L. Q. Rev. 410.

DOWER — NATURE OF THE RIGHT DURING HUSBAND'S LIFE. — The contingent right of a wife, during the husband's life, to dower in his real estate, is property of a substantial value. The release of this right, by joining in a mortgage of the husband's lands to secure his debt, inures only to the benefit of the mortgagee; the entire interest of the husband shall be used to discharge the mortgage before resorting to the wife's contingent right, and whatever surplus from the sale of the land remains after discharging the mortgage shall be used to satisfy the wife's right in full, before the judgment creditors of the husband obtain anything. *Mandel v. McClare et al.*, 22 N. E. Rep. 290 (Ohio).

EQUITY JURISDICTION — OBLIGATIONS IMPOSED BY LAW. — The charter of a railroad company authorized it to construct its road across highways on condition that any highway so crossed should be restored to its former good condition. Under this charter it had constructed a certain bridge as a highway crossing. This bridge falling into decay, the defendant railroad refused and failed to repair it, whereupon the county replaced the bridge with one suitable for travel, and substantially the same as the former one. The county commissioners filed a bill to require the railroad to repay the expense incurred in rebuilding this bridge. Decree was entered granting this relief. *Chesapeake O. & S. W. R. Co. v. Dyer County*, 11 S. W. Rep. 943 (Tenn.).

EQUITY JURISDICTION — OBSTRUCTION TO WATER COURSES. — An upper riparian owner built a dam for the purpose of supplying a neighboring town with water. This diversion the court held to be unlawful because it was an extraordinary and artificial use of water; yet, as the plaintiff did not show any special damage, equity would not interfere, but would leave the plaintiff to his action at law. *Ulbricht v. Eufaula Water Co.*, 6 So. Rep. 78 (Ala.).

ESTOPPEL — BY CONDUCT. — A tax-payer signs a petition for the passage of an ordinance levying a special tax for the purpose of rebuilding a court house, which has been burned, and afterwards voted for such ordinance. *Held*, that he will be estopped from setting up the illegality of the tax as a defence against payment of it, as he was benefited by the rebuilding of the court house. *Andrus v. Board of Police of Opelousas*, 6 So. Rep. 603 (La.).

HIGHWAYS — STREAMS USED FOR DRIVING LOGS. — The public has a right to use as a highway not only tidal rivers and fresh-water navigable rivers, but also such streams as are capable of floating logs or timber. In order to entitle the public to use it as a highway, the stream need not be at all times capable of floating logs, but it will suffice that when the water is high it is thus capable, for such a length of time as would make it useful and profitable for the public to so use it as a highway to float logs to mill or market. *Gaston v. Mace et al.*, 10 S. E. Rep. 60 (W. Va.).

The doctrine of this case is becoming pretty well established in this country, though denied or modified in some states. See 2 Gray, Cases on Property, 579, n.

INSURANCE — CANCELLATION OF POLICY — ESTOPPEL. — A policy provided that it might be cancelled on giving notice to the assured and repayment of the premium. Notice of cancellation was given, but the premium was not refunded. *Held*, as the assured showed by his conduct that he regarded the policy as cancelled, and thereby, presumably, induced the company not to make a formal tender of the premium, he is estopped to set up the non-payment. *Hopkins et al. v. Phoenix Ins. Co.*, 43 N. W. Rep. 187 (Ia.).

LANDLORD AND TENANT — DANGEROUS PREMISES. — Defendants, having a vested remainder in a pier, came into possession thereof subject to an outstanding lease. The pier was out of repair when the lease was executed. *Held*, although the defendants had the right, but not the duty to enter to make repairs, they were not liable for an injury caused by the defective condition of the pier during the continuance of the lease, since they had no notice of the defects. *Ruger C. J., Danforth and Gray J.J., dissenting.* *Abern v. Steele*, 22 N. E. Rep. 193 (N. Y.).

This case is valuable for the thorough discussion, in both the majority and dissenting opinions, of the principles and decisions upon which depends a landlord's liability for a nuisance on leased premises.

MALICIOUS PROSECUTION — CIVIL ACTION. — "An action may be maintained for the prosecution of a civil suit maliciously and without probable cause, even though there was no interference with the person or property of the defendant" in the civil suit. — *McPherson v. Runyon*, 43 N. W. Rep. 392 (Minn.).

NEGLIGENCE — IMPUTABILITY — PARENT AND CHILD. — In an action by a child against a defendant for damages caused by negligence, the negligence of the parent cannot be imputed to the child. The law was thus settled for Iowa in *Wymore v. Mahaska County*, 43 N. W. Rep. 264 (Ia.).

NEGLIGENCE — RAILROAD CROSSING. — Where a railroad company maintains a crossing over a road which was not made public by law, and over which it was not bound to maintain a crossing, it will be held liable for injuries caused by negligent construction of the crossing. The court, after saying that the company was not bound to maintain such a crossing, says, "but if it voluntarily assumes to do so, knowing that it is a road in common use by the public, it in effect invites the use of it and proclaims it safe," etc. *Missouri Pacific Ry. Co. v. Bridges et ux.*, 12 S. W. Rep. 210 (Tex.).

PARTNERSHIP — LIABILITY OF DECEASED PARTNER'S ESTATE. — Articles of co-partnership provided that on the death of either partner the business should be conducted by the survivor for five years; deceased's estate to receive profits and bear losses as it would have done had he lived. *Held*, this agreement only means that the property invested in the business, at the time of the partner's death, shall continue therein for five years, and therefore deceased's general estate is not liable for debts contracted during that period, by the surviving partner. *Stewart et al. v. Robinson et al.*, 22 N. E. Rep. 160 (N. Y.).

REAL PROPERTY — CONTINUOUS AND APPARENT EASEMENTS. — The testator built two houses on adjoining lots. They were two stories high, with a common partition wall. The upper rooms were reached by a stairway, wholly within one of the buildings, but attached to the partition wall. *Held*, that a devise of the other building carried the right to use the stairway according to the custom of the testator. *Howell v. Estes*, 12 S. W. Rep. 62 (Tex.).

The doctrine of a continuous and apparent easement was recognized by the court. This doctrine is one which is not recognized by all the States, some, as for example Massachusetts, holding that the easement to pass in such case must be strictly necessary to the enjoyment of the estate.

REAL PROPERTY — COVENANT AGAINST INCUMBRANCES — EXISTING EASEMENTS. — A buyer agreed to take certain land on delivery to him of an abstract of title showing the property to be free from incumbrances. A railroad had a right of way over the property. The buyer knew this at the time of the agreement, and that it enhanced the value of the property. *Held*, seller cannot have specific performance. The right of way is an incumbrance. *Farrington et al. v. Tourtelott*, 39 Fed. Rep. 738 (Mo.). See in accordance with this decision *Huyck v. Andrews*, 113 N. Y. 81, digested 3 HARV. L. REV. 94.

REAL PROPERTY COVENANTS RUNNING WITH THE LAND. — The owner of two estates conveyed one of them: "Provided always and these presents are upon this express condition" . . . that the premises should never be occupied as a tavern. The other estate was subsequently conveyed without any such provisions. Subsequently both estates were purchased by one Post. *Held*, the restrictive clause in the deed was a covenant running with the land, and not a condition subsequent, and was extinguished by the union of both estates in Post. The same words may create either a condition or a covenant depending upon the intention of the parties. *Post et al. v. Weil et al.*, 22 N. E. Rep. 145 (N. Y.).

SALE — CONDITIONAL UPON PAYMENT. — Where goods are sold upon express agreement that they are to be paid for on the receipt of invoice, the title does not pass until such payment; and where the vendee fails to comply with the condition, the vendor may recover the goods from a third person, a *bona fide* purchaser, to whom they were sold shortly after. *Harmon v. Goetter et al.*, 6 So. Rep. 93 (Ala.).

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER. — Plaintiff signed administrator's bond as surety at the request of defendant and latter agreed to indemnify him against loss. Plaintiff was warranted by defendant's language in presuming that the latter was the only administrator, but there was in fact another who was a

party to the same bond and for whose default the plaintiff became liable. *Held*, although defendant's promise of indemnity, for the other administrator, may be severable, it is not within the statute of frauds as being a promise to pay the debt of another. There was no debt of the other administrator, at the time the promise was made, and it was not made to one entitled to enforce such other administrator's liability. *Tighe v. Morrison*, 22 N. E. Rep. 164 (N. Y.).

STATUTE OF LIMITATIONS—TACKING INTERESTS.—Land which had been held adversely came into the hands of a receiver, by whom it was sold to the defendant. The time from the beginning of the adverse possession to the time of bringing action was sufficient to satisfy the Statute of Limitations, and it was held that there was a continuity of adverse holding, the receiver being the successor, or, perhaps, the *quasi* agent of the original holder. The interests were therefore to be tacked. *Verdery et al. v. Savannah, F. & W. Ry. Co.*, 9 S. E. Rep. 1133 (Ga.).

SURETYSHIP—RELEASE OF PRINCIPAL.—Plaintiff became surety on a builder's contract in consideration that the owner would pay him "from said contract, at its completion, the sum of \$1,000." Before completion, the owner released the builder from the conditions of the contract and paid him the contract price, less \$1,000 as agreed. He then refuses to pay the surety, because the builder has not fulfilled certain conditions. *Held*, that though no action lay against the surety, the owner can set off against his claim for the \$1,000, the damage resulting from the builder's default. *St. Mary's College v. Meagher*, 11 S. W. Rep. 608 (Ky.).

TRUSTS—FOLLOWING TRUST PROPERTY.—The plaintiffs delivered certain quantities of iron rods to the New Haven Wire Co., on the agreement that the company should become the owners, on payment of advances made by the plaintiffs. It was also agreed that the company should have the power to sell the rods provided that it would turn over the proceeds to the plaintiffs. At some time later than May, 1887, the company sold part of the rods but mingled the proceeds with its own funds. On Sept. 7, 1887, the company went into the hands of a receiver. *Held*, that the trust money could not be followed and that the plaintiffs must come in with the other creditors. *Baring v. Galpin*, 18 Atl. Rep. 268 (Conn.).

USURY.—A loan is not usurious when the agent of the lender, in addition to the highest legal rate of interest, deducts his own fee from the amount of the loan, unless the deduction was made with the lender's knowledge. *Vahlberg v. Keaton*, 11 S. W. Rep. 878 (Ark.).

This seems to be the general rule. *Dagnell v. Wigley*, 11 East, 43; *Philo v. Butterfield*, 3 Neb. 256; *Estevez v. Purdy*, 66 N. Y. 446. Though there is some authority contra; *Austin v. Harrington*, 28 Vt. 130.

In a few jurisdictions it is held that knowledge on the part of the lendee will not make the loan usurious, provided he received no share of the bonus. *Conover v. Van Mater*, 18 N. J. Eq. 481.

WATER-RIGHTS—COVENANTS RUNNING WITH THE LAND.—A number of lots on the west side of a river were supplied with water for manufacturing purposes through "Brown's race." These lots were owned by different persons who were entitled in severalty to the use of the water in the "race." These owners banded together to purchase a lot on the east side of the river, and made an agreement which showed that each paid a share of the purchase price proportional to his water-power in "Brown's race," that the object of the purchase was to obtain the water belonging to the east-side lot for use in the "race," and that each of the purchasers was to use an amount of this new supply proportional to his former interest in the "race." All the existing rights of the purchasers to remain unaffected, and if the purpose of the purchase failed the land was to be again sold and the proceeds divided. *Held*, that this agreement consisted of personal covenants by the parties as to the manner of using the property, and there was no grant from one to another of interests in the several and independent estates on the "race" so as to make the covenants run with the land. Therefore these covenants bound no grantee of any party unless specifically imposed upon the grantee or assumed by him. *Lawrence et al. v. Whitney et al.*, 22 N. E. Rep. 174 (N. Y.).

WILLS—MURDER OF THE TESTATOR BY LEGATEE.—A legatee, who knows that the testator has some intentions of revoking his will to the legatee's disadvantage, and murders the testator to prevent such possible revocation, shall not take any benefit under the will or any interest in the estate.

Gray and Danforth, J.J., dissenting.

The argument of the majority of the court is, that no one shall be permitted to profit by his own fraud, or take advantage of his wrong; that there was no certainty that the testator would not change his will or even survive the legatee, and that, as the legatee by his crime made the will speak and have operation, if the will is allowed full effect, the legatee will profit by his own wrong. The civil law expressly provides that a legatee who has acted thus shall take none of the testator's property, and our law makers did not insert a similar provision in our statutes, because they thought that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. The dissenting opinion delivered by Gray, J., contends that this matter is in no sense equitable, but that the court is bound by the statutory provisions as to altering and revoking wills; and since this will has not been revoked according to the statutes, it must have full effect. The reference to the civil law only furnishes an argument for making laws to meet such cases. The demands of public policy are satisfied by the punishment of the crime by the criminal courts, and to take away the legacy would be to impose an additional penalty. *Riggs v. Palmer*, 22 N. E. Rep. 188 (N. Y.).

In other cases where an heir or legatee has been forced by the court to give up some of the benefit which otherwise he would have received by descent, or under the will, the decisions have rested on the ground, that, as the defendant has by his fraud prevented the deceased from doing an act in favor of the plaintiff, the defendant is a constructive trustee of the property so acquired, and holds it for the benefit of the plaintiff. See *Luttrell v. Olmsius*, 11 Ves. 638; *Goss v. Tracy*, 1 P. Wms. 287; *Lester v. Foxcroft*, Colle's Parlia. Cas. 108.

In this case it was not certain that the testator would ever revoke his will, or in whose favor a possible new will would be made. There is therefore no chance for a constructive trust since there is no one who can claim as *cestui*. Cases where the beneficiary of a life-insurance policy murders the assured, and is therefore not allowed to recover the insurance money, are not in point. A policy is a contract, and in order to recover the beneficiary must prove his right under the contract, which he clearly cannot do.

The principle of the case would seem to require that no legatee or heir take the property of a testator whom he has murdered, no matter what motive led him to commit the crime. It is peculiar that such an important principle should have been supported in the past by no cases directly in point. The only other court in which a like state of facts has been passed upon seems to have been in North Carolina (*Owens v. Owens*, 100 N. C. 240, referred to in the opinion of the majority), where the opposite result was reached.

REVIEW.

A BRIEF FOR THE TRIAL OF CRIMINAL CASES. By Austin Abbott, assisted by William C. Beecher, late Assistant District Attorney of the City of New York. New York: Diossy & Co., 1889. 8vo. pp. xvii. 566.

This is the second Brief from the pen of this author. The plan of these books is unique, and it would seem admirably adapted to the purpose. As the title indicates, the whole book is modelled on a brief. Principles are stated in clear, terse language, and in each case followed by a list of authorities. The scope of the work is well indicated by the author in the preface: "My aim has been to present those debatable questions which are now most constantly mooted at the trial, — to carry the exposition of each into sufficient detail to meet all ordinary aspects of the subject, and upon such questions to furnish counsel with the materials for discussion and discrimination, arranged in that concise, analytic form which we all find the most convenient as an aid to

the memory in dealing with questions which may unexpectedly arise in court; a form equally advantageous also in making that thorough preparation for trial that is becoming more and more essential."

The authorities cited for each point are carefully selected from the decisions of the various jurisdictions of this country, with an occasional reference to the English decisions. The points are well sustained by the citations, and the quotations are apt. Occasional comments add to the value of the work. The references to New York decisions are specially numerous, but the book is by no means local.

The arrangement is made throughout with a view to readiness of use as a manual; the various subdivisions are indicated by italics, and authorities, quotations, and comments are all indicated by distinctive type, enabling one at a glance to find principle and authority. It is to be regretted that the value of the headings of the pages has been much impaired by the neglect to select suitable "catch-words" to indicate their contents. "Rules &c." for example, gives little idea that the two hundred or more pages so headed contain rules of evidence; it must be said, however, that this fault is not so marked in the headings of the smaller divisions. Not only is the arrangement of the book admirably adapted to ready reference, but there is a very full table of contents and an excellent index.

On the whole it would seem that Mr. Abbott's work had been very successfully accomplished, and that in the Brief for the trial of Criminal Cases as in the Brief for Civil cases, he has given us an excellent manual.
G. P. F.

BOOKS RECEIVED.

THE AMERICAN DIGEST. (Annual, Vol. 2, 1888.) St. Paul: West Publishing Co., 1889. 8vo. pp. ix, 1538.

THE DEVELOPMENT OF THE CONSTITUTION AS INFLUENCED BY CHIEF JUSTICE MARSHALL. By Henry Hitchcock, LL. D. New York: G. P. Putnam's Sons, 1889. 8vo. pp. 68.

THE PLACE OF THE FEDERAL COURT IN THE AMERICAN CONSTITUTIONAL SYSTEM. By Thomas M. Cooley, LL. D. New York: G. P. Putnam's Sons, 1889. 8vo. pp. 26.

THE ANNUAL INDEX TO PERIODICALS. Bangor: W. M. Griswold, 1889. 8vo. pp. 47.

THE LAW STUDENTS' MONTHLY. Vol. 1, No. 1. George Wharton Pepper, Editor. Philadelphia: T. & J. W. Johnson & Co. pp. 71.

THE LAW OF FEDERAL SUFFRAGE, An argument in support of. By Francis Minor, of the St. Louis Bar. 8vo. pp. 8.

HARVARD LAW REVIEW.

VOL. III.

JANUARY 15, 1890.

No. 6.

A BRIEF SURVEY OF EQUITY JURISDICTION.¹

V.

BILLS OF EQUITABLE ASSUMPSIT.

REFERENCE was made, in the preceding article,² to the wide, indeterminate, and vague sense in which the term "account" is used in equity; and it was observed that it has been usual to call all bills in equity, which may involve a reference to a Master, to take an account of any kind or for any purpose, bills for an account. Accordingly, it has been usual to call the bills now to be considered, bills for an account. Indeed, this is the only name by which they have ever been known; and no clear distinction has ever been taken between these bills and the class of bills treated of in the preceding article. Moreover, the writer is not aware that it has ever been doubted that the former constitute true bills for an account. To call them, therefore, Bills of Equitable Assumpsit, is undoubtedly a novelty; but it is a novelty which is believed to be justified by the circumstances of the case. That the bills treated of in the preceding article are true bills for an account, is a fact which is not supposed to be open to doubt; and it is hoped that the present article will convince the reader of the necessity of finding another name for the bills now to be con-

¹ Continued from Vol. II., p. 267.

² See Vol. II., p. 243.

sidered. "Equitable Assumpsit" may not be the best name that can be found, but it is believed to be open to no serious objection, and it is strictly analogous to the name given to another class of bills, namely, "Equitable Ejectment." It may be proper, however, to remind the reader that the term "equitable," in this connection, means, not that the claim on which the bill is founded is equitable, but that the suit instituted by the bill differs from an action of assumpsit only or chiefly as a suit in equity necessarily differs from an action at law.

As bills for an account have been pretty fully described in the preceding article, it will be convenient, in the present article, to point out in what particulars bills of equitable assumpsit differ from bills for an account. First, then, while, as has been seen, a bill for an account is founded upon an obligation to render an account, a bill of equitable assumpsit is founded upon a debt; and, while it is the object of a bill for an account to compel performance of an obligation to account, it is the object of a bill of equitable assumpsit to compel payment of a debt.

Secondly, though the final relief upon both classes of bills is the same, namely, the payment of a debt, yet, while upon a bill for an account, such final relief is strictly consequential upon the taking of an account, which constitutes the primary relief, upon a bill of equitable assumpsit the payment of a debt constitutes the entire relief sought. In other words, the debt finally recovered upon a bill for an account has no legal existence until the account is taken and a balance struck, and therefore the accounting is always the cause of the debt, while the debt recovered upon a bill of equitable assumpsit exists when the bill is filed, and the bill is founded upon it, and the cause of the debt varies with the transaction out of which the debt arose. A consequence of this distinction is that, in a bill for an account, it is necessary only to state facts which constitute an obligation to account, and that an accounting will show a balance in the plaintiff's favor, while, in a bill of equitable assumpsit, it is necessary not only to state facts which constitute a debt, but also to show the amount of the debt. This latter rule is not, indeed, so strictly applied as to require a plaintiff to state the precise amount due to him, at the peril of having his bill dismissed, but it effectively prevents a plaintiff from recovering *more* than he claims. If the amount originally due to the plaintiff has been reduced by payments, he may either claim

the full amount originally due to him (in which case, of course, the defendant must set up the payments as a defence *pro tanto*), or he may, at his option, claim only what remains due to him after deducting the payments. Before taking this latter course, however, the plaintiff must make sure that what he allows as a payment, is in truth a payment, and not a cross claim or set-off; for, if he allows as a payment what is in truth a cross claim or set-off, the consequence will be that he will reduce the amount of his own claim, and yet leave the defendant's cross claim in full force. Whenever, therefore, there exist cross demands between two persons, and one of them files a bill of equitable assumpsit against the other, the only safe course for the plaintiff is to claim the full amount of all the items in his favor, paying no attention to the items in the defendant's favor, but leaving the defendant either to avail himself of the items in his own favor in the same suit, or to make them the subject of a separate suit, at his option.

Thirdly, while the jurisdiction of equity over bills for an account is founded on the nature of the obligation sought to be enforced, coupled with the fact that there is no remedy at law for the enforcement of such an obligation, the jurisdiction of equity over bills of equitable assumpsit is founded on the fact that the claim sought to be enforced is too complicated in its circumstances to be tried by a jury. While, therefore, a bill for an account involves primarily but one question, namely, is the defendant under an obligation to account to the plaintiff, a bill of equitable assumpsit involves two questions, namely, first, is the defendant indebted to the plaintiff? secondly, is the case too complicated to be tried by a jury? A consequence is that, while the plaintiff in a bill for an account has the affirmative of but one question to establish in order to entitle him to a decree, and hence it is impossible for him to fail except upon the merits of his case, a plaintiff in a bill of equitable assumpsit has the affirmative of two questions to establish, — one involving the merits of his case, the other involving only a question of jurisdiction; and if he fail to establish either, his bill will be dismissed. In short, while a bill for an account never properly involves any question of jurisdiction, a bill of equitable assumpsit always involves a question of jurisdiction. Moreover, as a plaintiff must always state in his bill whatever he will be required to prove at the hearing in order to obtain a decree, it follows that a plaintiff in equitable assumpsit must state facts showing not only

the existence of the cause of action on which the bill is founded, but also that it is a cause of action of which equity will take jurisdiction; and for this latter purpose it will not be sufficient to allege generally that the cause of action involves so much complication that it cannot be properly tried by a jury; but facts must be stated from which the court can see that such complication exists.

Fourthly, in equitable assumpsit, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account and by his authority, will constitute either a defence *pro tanto*, to be set up as such in the defendant's defensive pleading, or a cross claim in the defendant's favor, of which the defendant may avail himself in the same action or in a separate action, at his option. Upon a bill for an account, on the other hand, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account, has been paid in legal contemplation out of the plaintiff's own money in the defendant's hands, and, therefore, it constitutes neither a defence to the plaintiff's claim (which is only for such *balance* as shall be found in the plaintiff's favor upon the accounting), nor a cross claim in the defendant's favor. Such payments, therefore, should not properly be noticed in the defendant's pleadings, but will be allowed to him on the accounting as items of discharge.

Fifthly, a bill of equitable assumpsit, as well as a bill for an account, may be successfully met by the defence of an account stated; but the defences known by this name in the two classes of cases differ widely from each other. As the object of a bill for an account is to compel performance of an obligation to account, of course it is a good defence to such a bill that the obligation has been performed. Moreover, as the obligation is only to account, — not to account and pay, — it follows that an account stated is a complete legal defence to a bill for an account, as it was formerly (under the name of *plene computavit*) to an action of account. Such a defence, though it does not show that the plaintiff's claim has been actually satisfied, does show that its legal nature has been changed, — that it has been converted from a demand lying in account into a debt. In equitable assumpsit, on the other hand, the defence of an account stated does not show that the defendant's obligation has been performed, nor that the legal nature of the plaintiff's claim has been changed. The plaintiff's claim was originally a debt, and it is the same debt still; and an account stated simply shows that the amount of the debt has been ascer-

tained and settled. Clearly, therefore, it is no legal defence to the plaintiff's claim. And yet it is a good equitable defence to the bill. Why? Because it is a complete answer to a necessary allegation in the bill, namely, that the plaintiff's claim is too complicated to be tried by a jury. It is a good defence, therefore, going to the jurisdiction of the court.

Sixthly, though the first decree upon a bill of equitable assumpsit, like that upon a bill for an account, directs a reference to a Master to take an account, yet the account to be taken in the one case differs widely from that in the other. Upon a bill for an account, the object of the decree in directing an account is to compel performance by the defendant of his obligation; while, upon a bill of equitable assumpsit, the object is to ascertain the amount of the defendant's indebtedness to the plaintiff. In the first case, therefore, as the defendant is to be compelled to do what he ought to have done voluntarily and without a suit, all the burden of the accounting should be cast upon him. Accordingly, he is required to make up his account in proper form and bring it into the Master's office, making oath to it before the Master; and if the plaintiff can show that the account so brought in is defective, either in form or in substance, the defendant must supply its defects, unless he can show that it is impossible for him to do so. Nothing short of impossibility will exempt him from a full performance of his obligation. If he attempt to justify an imperfect account by saying that he cannot make it more perfect without consuming an excessive amount of time, and incurring great and unreasonable labor and expense, the conclusive answer will be that he has bound himself to account fully. In the second case, on the other hand, all the burden of the (so called) accounting rests upon the plaintiff. The only obligation which the defendant is under to the plaintiff is that of paying him the debt he owes him; and to the performance of that obligation the ascertaining of the amount of the debt is a condition precedent to be performed by the plaintiff. In short, the ascertaining of the amount is a part of the plaintiff's case, and the plaintiff, like other plaintiffs, must make out his case. To aid him in doing this he is, like other plaintiffs, entitled to discovery from the defendant, *i.e.*, he can compel the defendant to state under oath what he knows as to the amount of the debt, and also to produce under oath any books or documents in his possession which will aid the plaintiff in proving the amount of the debt;

but this is the limit of the plaintiff's rights. If, indeed, the amount of the debt originally due to the plaintiff has been reduced by payments, such payments constitute, as we have seen, a defence *pro tanto*, and so the defendant, of course, has the burden as to them. So if, as often happens in equitable assumpsit, the defendant sets up a cross demand, *i.e.*, while admitting that he owes the plaintiff, claims that the plaintiff also owes him, and demands that the debt due from the plaintiff to him shall be applied in payment and extinguishment of the debt due from him to the plaintiff, of course, the defendant will be plaintiff as to the debt claimed to be due to him, and so he will have the burden as to that. In a word, the so-called accounting before a Master in equitable assumpsit is a substitute for a trial by jury, and hence it is to be governed by the same principles as the latter, *mutatis mutandis*.

Seventhly, though the final decree upon a bill for an account, like that in equitable assumpsit, is for the payment of money, yet, while in the latter the recovery of money is the primary and direct object of the suit, in the former it is only consequential relief. When, upon a bill for an account, the defendant is adjudged to have fully accounted, the whole object for which equity assumed jurisdiction of the suit is accomplished. The plaintiff's claim has, by the accounting, been converted into a debt recoverable at law; and the only principle on which equity proceeds to decree payment of this debt is the avoiding of a multiplicity of suits. It follows, therefore, that a bill for an account, unlike a bill of equitable assumpsit, is always liable to involve two successive suits in one; namely, first, a suit for an account, and, secondly, a suit in the nature of an action of debt to recover the balance found in the plaintiff's favor. It is true that a bill of equitable assumpsit, like a bill for an account, always requires two decrees, as well as a reference to a Master, but that is merely because it is not the practice for the judge who hears a cause to occupy his time in ascertaining the amount due to the plaintiff. He contents himself with ascertaining that the plaintiff has a cause of action, *i.e.*, that he is entitled to recover something, and delegates to one of his assistants the duty of ascertaining the amount of the plaintiff's claim. The reference to the Master, therefore, is merely for the purpose of completing the trial, which is left unfinished at the hearing. If the trial were completed at the hearing, there

would be no reference and only one decree. Upon a bill for an account, on the other hand, the trial is finished at the hearing, and the decree then made is in its nature a final decree, and the reference ordered is for the purpose of obtaining an execution of that decree. The fact, therefore, of there being two decrees upon a bill for an account is due entirely to the double nature of the suit just referred to. Were it not for this latter circumstance, there would be but one decree, and the suit would end with the taking of the account. As it is, the two decrees which are made are both final in their nature (each of them disposing of the whole subject of one suit), while the first decree upon a bill of equitable assumpsit is, in its nature as well as in name, interlocutory.

Lastly, an injunction to restrain the defendant from suing at law is a very common incident of a bill of equitable assumpsit, while it is never an incident of a bill for an account. The reason of this distinction is in one view plain enough. No action at law will lie on an obligation to account, and hence equity can have no occasion to enjoin such an action. On the other hand, whenever a bill of equitable assumpsit will lie, an action of debt or assumpsit will also lie; and, therefore, equity will have occasion to grant an injunction as often as a plaintiff sues at law when he ought instead to have filed a bill of equitable assumpsit. But how can it be said that a plaintiff, who confessedly has a legal right upon which an action will lie, *ought* to enforce that right in equity, and not at law? The reason why equity enjoins the prosecution of an action at law generally is, not that the plaintiff ought to have sued in equity (for generally in such cases he could not have sued in equity if he would), but that he ought not in justice to recover at all, or, at least, ought not to recover so much as he would recover at law. In other words, the reason is that the defendant has an answer to the action, or to some part of it, which in justice and equity ought to prevail, but which for some technical reason is unavailable at law. In the case now supposed, however, there is no element of injustice in the plaintiff's claim; and even if there were, it would not follow that the plaintiff ought to have refrained from suing at law, and to have sued in equity instead. A plaintiff never even has a right (much less is it his duty) to sue in equity on a legal claim, merely because, if he sue at law, he will get what he ought not to get. When a plaintiff sues in equity upon a legal claim, he does so, as a rule, in the

exercise of a privilege, not in the performance of a duty; he is permitted, not required, to sue in equity, and therefore he selects his tribunal with a view to his own interests, — not with a view to the defendant's interests, — and the latter has no voice in the question. Accordingly, even when actions of account were in use, though a plaintiff was permitted to file a bill for an account, on the ground that an action of account was an inadequate remedy; yet, if he chose to bring an action of account, the defendant could not obtain an injunction, though he might prefer to account in equity. How is it, then, that the case now under consideration forms an exception to the general rule? The answer to this question illustrates the very peculiar ground upon which equity assumes jurisdiction in this class of cases, namely, the unfitness of a common-law court for the trial of them. In the question, *How shall a case be tried?* the defendant is of course as much interested as the plaintiff, and therefore he is entitled to be heard before being forced to go to trial in a common-law court in a case for which he deems the common-law mode of trial unfit. Where then can he be heard? Not in the common-law court where the action is brought, for such a court cannot decline jurisdiction of a case regularly brought before it, and its only way of disposing of the case is by trying and deciding it, and its trial and decision will be final and conclusive. Moreover, such a court has but one mode of trial, namely, by a jury. With the consent of both parties, indeed, it can and will refer a case to an arbitrator, if it be deemed unfit to be tried by a jury; but without such consent the court is powerless.

A court of equity, then, is the only place in which the defendant can be heard upon the question whether the case is fit to be tried by a jury; and accordingly he may file a bill for the purpose of obtaining such a hearing. What will be the equity of such a bill, and what relief will it seek? If the defendant have no cross demands, it seems that the equity of the bill will be only this, namely, that the defendant is prosecuting an action against the plaintiff which is unfit to be tried by a jury, and the only relief prayed will be a perpetual injunction against the prosecution of the action. At the hearing, therefore, the only question to be tried and decided will be whether the action is fit to be tried by a jury. If that question be decided in the affirmative, the bill will be dismissed; if it be decided in the negative, a *decree* will be made for

a perpetual injunction. In the former event, of course the action at law will proceed; in the latter, the plaintiff at law, if he wish to enforce his claim, will have to file a bill of equitable assumpsit, as he ought to have done in the first instance.

If the defendant at law have cross demands against the plaintiff at law, his bill may, at his option, have a double equity; namely, first, that he has demands against the defendant in equity which are unfit to be tried by a jury; secondly, that the defendant in equity is prosecuting an action at law against him which is unfit to be tried by a jury; and accordingly double relief may be prayed, namely, first, that the defendant in equity be compelled to satisfy the demands of the plaintiff in equity; secondly, that the prosecution of the action at law be enjoined. In short, the bill may have the double character of a bill of equitable assumpsit and a bill to enjoin an action at law. If the bill assume this double character, the subsequent stages of the suit will vary according to circumstances. Thus, if the defendant resist the suit in both its aspects, there will be two questions to be tried at the hearing; namely, first, whether the claim set up in the bill is fit to be tried by a jury; secondly, whether the action at law is fit to be tried by a jury. If the first question be decided in the affirmative, so much of the bill as seeks a recovery against the defendant will go for nothing. If the second question be decided in the affirmative, so much of the bill as seeks an injunction will go for nothing. If both questions be decided in the affirmative, the bill will be dismissed. If the second question be decided in the negative, a perpetual injunction will be granted, and the plaintiff at law will have to file a bill of equitable assumpsit, if he wish to enforce his claim. If the first question be decided in the negative, it will follow that the plaintiff in equity is entitled to enforce his claim in equity; and accordingly a decree will be made, referring the cause to a Master to take an account of the plaintiff's claim, *i.e.*, to ascertain its amount. When the amount has been ascertained, the cause will be brought on again, and a final decree will be made that the defendant pay the plaintiff the amount found due to the latter. If both questions be decided in the negative, of course the plaintiff will be entitled to both branches of relief just indicated.

The defendant in equity may, however, think it not for his interest to resist the suit in equity; and in that case he will submit to an injunction, and will set up his cross claims, either in his

of them files a bill of equitable assumpsit against the other, and the latter sets up the claims in his own favor, either in his answer or in a cross-bill (in which latter case the suit and cross-suit are heard together and as one suit), of course the trial will presumably involve twice as much complication as if the items in the plaintiff's favor were alone to be tried; and that fact has led to the opinion that the question, whether equity shall assume jurisdiction in a given case, depends largely upon whether there are cross demands.¹ That opinion, however, seems to be erroneous. First, the question is, not what complication a suit in equity *may* involve, but what complication a trial at law *will* involve. Secondly, cross demands can be tried at law in one action only when the defendant sets up the demands in his favor by a plea of set-off, or (in the modern statutory systems) by a counter-claim; and whether a defendant in an action shall avail himself of items in his favor by way of set-off or counter-claim, or by a separate action, is entirely at his option. Suppose, then, one of two persons between whom cross demands exist, brings an action at law on the items in his favor, and thereupon the other files a bill of equitable assumpsit and for an injunction. First, the defendant in equity may demur to the bill as a bill of equitable assumpsit, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands in his favor are too complicated to be tried by a jury; and in deciding this question, clearly no notice can be taken of the demands in favor of the defendant in equity. Secondly, the defendant in equity may demur to the bill as a bill for an injunction, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands on which the action at law is founded are too complicated to be tried by a jury; and here again no notice can be taken of the demands in favor of the plaintiff in equity, for he has not set them up in the action at law; and even if he had done so, he could not make that fact a ground for asking for an injunction. If both demurrers be allowed, on the ground that the demands of neither party are too complicated to be tried by a jury, and thereupon the plaintiff in equity plead the demands in his favor by way of set-off or counter-claim to the action at law brought against him, it may happen that the demands of both parties will make the case too complicated to be tried by a jury, though the demands of neither party alone would

¹ But see *infra*, p. 250, n. 1.

have that effect. If such an improbable event should happen, the plaintiff at law would clearly be entitled to abandon his action at law, and file a bill of equitable assumpsit, setting forth his claim, that he had brought an action to enforce it, and that the defendant to the action had set up therein demands in his own favor by way of set-off or counter-claim, and had thus rendered the action too complicated to be tried by a jury. It is true that the existence of cross demands would thus become indirectly the cause of equity's assuming jurisdiction, but the direct cause would be the fact of the defendant's insisting upon having the demands in his favor tried in the same action in which the plaintiff's were tried.

It is possible also that the plaintiff might take another course in the case just supposed; namely, file a bill to restrain the defendant from giving any evidence, on the trial of the action, in support of the demands in his favor, and thus making it impracticable to try the action. Whether such a bill would lie or not, would seem to depend upon whether the right of the plaintiff to have his case tried by a jury, or the right of the defendant to have his demands set off against the plaintiff's demands, should be deemed the more sacred.

Much of the uncertainty and confusion to be found in the books on the subject of cross demands are due to the inveterate habit, prevailing among lawyers as well as among laymen, of applying unconsciously to cross demands the civil-law doctrine of compensation (*compensatio*); namely, that cross demands extinguish each other *ipso jure*, and hence that only the balance (in favor of the party whose demands are the larger) is due.¹ If the doc-

¹ A mistake could scarcely become so prevalent without some special reason; and more than one such reason can easily be found. First, the doctrine of compensation is founded in natural justice. "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater; and that the difference is the only sum that can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately in separate actions. . . . The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, c. 17, § 11, and 5 Geo. II., c. 30, § 28. . . . Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that Parliament interfered by 2 Geo. II., c. 22, § 13, and 8 Geo. II., c. 24, § 5 [Statutes of Set-off]." Per Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2214, 2220-1. Secondly, the system of merchants' accounts, which had its origin in countries where the civil law prevailed, and which is in use all over the world, has made every mercantile man familiar in practice with the doctrine of compensation. According to that system, there is no difference between the payment of a debt and a loan of money. In the case of either, the person receiving the money is made debtor for it,

trine of compensation were a part of our law, it would, of course, follow that cross demands could never be separated from each other, and that they would always have to be the subject of a single trial, and hence that demands in favor of a defendant would always have the same effect in rendering a trial complicated as demands in the plaintiff's favor.¹ In short, by the doctrine of compensation every demand in a defendant's favor operates as a payment of the demands in the plaintiff's favor until the latter are extinguished, and hence every such demand is subject to the observations made in a previous paragraph on the defence of payment.²

Though cross demands do not with us extinguish each other *ipso jure*, yet they may be made to do so by the parties to them, and that too by a mere agreement, and without any physical act being done. Thus, if A owe B \$1,000, and B owe A \$500, and they agree that the two demands shall be set off against each other, the debt due to A and one-half of the debt due to B will thereupon be extinguished, and a debt of \$500, due from A to B, will alone remain.³ That this result would be produced by the

while the person from whom it is received is made creditor. Thus, if A lend \$100 to B, A is made creditor for \$100 in the books of B, and B is made debtor for \$100 in the books of A. Then, when B pays the debt, B is made creditor for \$100 in the books of A, and A is made debtor for \$100 in the books of B. Thus, A and B are each both debtor and creditor on the books of the other for \$100; and then, by the operation of the doctrine of compensation, the debt due by each to the other is extinguished by the debt due to him from the other; and, according to merchants' accounts, it is in this way alone that a debt can ever be paid.

¹ And this accounts in part, at least, for the opinion which has been combated in the last paragraph but one. Indeed, Lord Justice Turner, who went the length of holding that bills of equitable assumpsit are confined to cases of cross demands, based his opinion entirely upon the doctrine of compensation. Thus, in *Phillips v. Phillips*, 9 Hare, 471, he said: "A bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts, and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments." And see, to the same effect, *Padwick v. Stanley*, 9 Hare, 627; and compare *Makepiece v. Rogers*, 4 DeG., J. & S. 649.

² See *supra*, p. 247.

³ "If obligor or feoffor be bound by condition to pay 100 marks at a certain day, and at the day the parties do account together, and for that the feoffee or obligee did owe £20 to obligor or feoffor, that sum is allowed, and the residue of the 100 marks paid, this is a

payment of \$500 by B to A, and the immediate repayment thereof by A to B, is plain; but such payment and repayment would be an idle ceremony, and therefore the same result may be produced without performing that ceremony. So when two persons, between whom numerous cross demands exist, state an account (as it is called) and strike a balance, the effect is, that all the demands on one side, and all those on the other side, except such balance, are extinguished; for, by stating the account, the parties ascertain and agree upon the amount due by each to the other, and by striking a balance they agree that the cross demands so ascertained and agreed upon shall be set off against each other.

There is, however, a material distinction between the operation of law in extinguishing cross demands and the operation of an agreement of the parties in producing the same result; for the former, while it makes it a condition of enforcing the demands of either party that the amount of the demands of each party be ascertained, does nothing in the way of satisfying that condition, but leaves the amount of each party's demands just as uncertain as it would be if no extinguishment of them had taken place; and hence the application of the doctrine of compensation to cross demands always increases the complication of a trial, for it introduces new elements of complication without removing any old ones. In short, while the law can by its own operation cause cross demands to extinguish each other, so that the difference, if any, between them will alone remain due, it cannot ascertain the amount of such difference, if any, nor in favor of which party it exists. On the other hand, an agreement between two parties to set off their mutual demands against each other will seldom be made,

good satisfaction; and yet the £20 was a chose in action, and no payment was made thereof but by way of retainer or discharge." Co. Litt. 213 a. "If the condition of an obligation be to pay 100 marks at a day, and at the day the obligor and obligee account together at another place, and because the obligee owes to the obligor £20 by another contract, the obligee allow the £20 in payment of the 100 marks, this is a good satisfaction of the condition, for this is all one as if the obligor had paid the obligee, and he had repaid him. 12 R. 2, Barre, 243. This is a payment by way of retainer." 1 Rol. Abr. 471, pl. 5. "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment, is this: If the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment it has the same effect, because in contemplation of law a pecuniary transaction is supposed to have taken place by which each debt was then paid." Per Lord Campbell, C. J., in *Livingstone v. Whiting*, 15 Q. B. 722. And see, to the same effect, *Callander v. Howard*, 10 C. B. 290.

unless the amount of such demands be known; and, even if their amount be known, such an agreement will seldom be made except by implication, and as an incident to or a consequence of some other agreement or transaction. Thus, an agreement between two parties to set off mutual demands, as to the amount of which there has never been any dispute or uncertainty, will seldom be made, except as incidental to the payment of the difference between them, and even then the only evidence of such an agreement will commonly be found in the fact that the parties treat such difference as the only debt existing between them. So also an agreement between two parties to set off mutual demands, the amount of which has been the subject of dispute or uncertainty, will seldom be made, except as a consequence of the ascertainment and settlement of such amount; and even then the only evidence of such an agreement will commonly be found in the fact that the parties strike a balance, and treat such balance as the only debt existing between them. Hence, a set-off of mutual demands, by agreement between the parties thereto, so far from introducing any new element of complication, removes any complication which previously existed, and, so far from giving to either party a right to go into equity, it takes away any such right that previously existed.

When an account is stated of cross demands between two parties, and a balance struck, it seems that the implied agreement to set off the cross demands against each other will remain in force, though the statement of account be afterwards impeached and set aside, *e.g.*, on the ground of fraud; and the effect, therefore, will be the same as if an agreement had been made to set off the cross demands against each other without any statement of account, or as if the cross demands had been set off against each other by mere operation of law; and hence, though a balance only will remain due, yet, before such balance can be recovered, the amount of it must be ascertained, and to which of the two parties it is due; and therefore the agreement to set off the cross demands against each other may result in the necessity of ascertaining, in a single suit, the amount due to each party from the other before any set-off was made, and thus, by increasing the complication, confer jurisdiction upon equity.

An agreement between two parties to set off cross demands against each other may, however, relate to cross demands not then

existing, but thereafter to arise; and in that case it seems that the agreement will operate upon the cross demands and cause their mutual extinguishment the moment they arise, provided neither of the parties have given any notice to the other to the contrary; for, in the absence of such notice, the parties will be conclusively presumed to remain of the same mind they were of when the agreement was made, and therefore the effect will be the same as if the agreement had been made at the moment when the cross demands arose. It is as true, however, of such an agreement as it is of an agreement to set off existing cross demands, that it will seldom be made otherwise than by implication; and the implication in this latter case will generally arise, if at all, from the nature and the course of the dealing between the parties. Moreover, the agreement will arise the moment it is called for by circumstances, *i.e.*, the moment that cross demands come into existence, and not till then; and as often as new cross demands arise, a new agreement to set them off against each other will arise. The cross demands, therefore, and the agreement to set them off against each other, will always co-exist, and hence there can be no doubt that the agreement will operate upon the cross demands and cause their actual extinguishment. And yet the amount of the respective cross demands will remain to be ascertained; and therefore such an agreement will have the same effect in increasing complication as an extinguishment of cross demands by operation of law.

It is, it seems, on the principle just explained, that cross demands between a banker and his customer extinguish each other. Indeed, if there be cross demands between a banker and his customer, there can be no doubt that they extinguish each other, and they can do this only in the mode just explained or by operation of law. Do cross demands, then, arise between a banker and his customer in the ordinary course of business? That every deposit by a customer with his banker creates a debt in favor of the former and against the latter, of course there is no doubt. Does every payment by the banker of a check drawn by the customer create a debt in favor of the former and against the latter? The general opinion seems to have been that it does not, but that it constitutes a payment *pro tanto* of the debt due from the banker to the customer.¹ This opinion, however, seems not to be well

¹ See *Devaynes v. Noble*, 1 Mer. 529.

founded. The question does not depend upon the intention of the parties, but upon the legal operation of a check. A check, which is in effect a bill of exchange, does not call for the payment of a debt, but for the payment of the sum of money named in the check on the customer's account; and therefore the payment, when made, constitutes a debt for money paid by the banker to the customer's use. The check calls for the payment by the banker of the amount named in the check, without regard to the state of the account between the banker and the customer; but if the payment which it calls for were the payment of a debt due from the banker to the customer, it would be payable only to the extent of the debt then actually due from the former to the latter, and any payment beyond that amount would be made without authority. Indeed, payment of a check by a banker would be an admission by him that so much was due from him to the customer. Moreover, on the supposition just made, a check would operate as an assignment *pro tanto* of the debt due from the banker to the customer, and would thus give to the payee a right in equity to recover against the banker without any acceptance of the check by the latter; and yet it is well known that a check does not so operate.

Upon the whole, therefore, it seems that the items on the banker's side of his account with his customer constitute cross demands in his favor, or rather that they would do so but for the fact that they are set off against the items in the customer's favor the moment that they come into existence.¹ However, it is not material to the present inquiry whether they constitute cross demands or payments, for in either case they must equally be taken into account in considering whether a case between a banker and his customer is sufficiently complicated to warrant the filing of a bill in equity.

Though an agreement between two parties that their mutual demands shall be set off against each other will cause an actual set-off to take place, yet an agreement between two parties that their mutual demands shall be extinguished will not cause an ex-

¹ It is scarcely necessary to observe that, as a banker credits his customer with all deposits made by the latter, so he debits him with all checks drawn by the customer on the banker, and paid by the latter. But for the reason stated in a previous note (p. 249, n. 1), no inference can be drawn from this circumstance that the items on the debit side of the customer's account constitute cross demands, and not payments of debts.

tinguishment to take place, unless the agreement can be construed as an agreement to make a set-off; for no debt or demand can be extinguished by a mere agreement. When, therefore, an extinguishment of cross demands takes place by way of set-off, it is immaterial, in respect to the extinguishment, whether the cause of the set-off be the agreement of the parties or the operation of law. It follows, therefore, that the extent of the extinguishment which takes place when cross demands are set off against each other, and hence the question to which of the parties, if to either, a balance remains due, as well as the amount of such balance, depend upon the amounts actually due from the parties respectively to each other before the set-off was made, and not upon the amounts agreed by the parties to be due. When, for example, an account is stated of cross demands between two parties and a balance struck, the statement of the account has no effect upon the cross demands, and hence it does not follow that the balance struck is the true balance, nor does the striking of it make it the true balance. And yet the statement of the account will be binding as an agreement (assuming, of course, that it has the ordinary requisites of a binding agreement), and hence the party in whose favor the balance is struck may recover such balance by reason of the agreement, but he must do so by an action on the agreement, and if he attempt to recover it as a part of the old debt still remaining due to him, the defendant may show that in truth the old debt has been wholly paid by means of the set-off. So, if either of the parties sue the other for any part of his old debt in violation of the agreement, the defendant will not be able to set up the account stated as showing that the debt sued for is not due,¹ and his only resource will be either to obtain an injunction against the action, or to set up the agreement as a defence by way of preventing circuitry of action.

From what has been said in the preceding paragraph, it follows that, in respect to the extinguishment of cross demands, there is no difference in law between the striking of a balance as the result of stating an account, *i.e.*, of ascertaining the amounts actually due from the parties respectively to each other, and the striking of a balance as the result of a compromise of uncertain, doubtful, or disputed demands. In either case the balance struck may be right, and in either case it may be wrong, the true balance depending in

¹ Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, the seventh plea was bad; and see cases cited *infra*, p. 262, nn. 2 and 3.

each case, not upon the statement of account or the compromise, but upon the facts which existed before the account was stated or the compromise made. In respect, however, to the agreement upon which the striking of the balance is based, there is a material difference between a statement of account and a compromise. The former is a regular and ordinary transaction, which generally takes place periodically and which is regarded by the parties to it as little more than routine. The latter, on the other hand, is entirely special in its nature. The former is in itself not an agreement, but a transaction which implies an agreement; and the only agreement which often accompanies it is such as it carries with it by implication. A compromise, on the other hand, is in itself an agreement and nothing else, and this is equivalent to saying that it is an express agreement. What the agreement is, therefore, in the case of an account stated, generally depends entirely upon implication or construction, and this implication or construction is of course always the same; and hence the question is one of law. In the case of a compromise, on the other hand, what the agreement is depends entirely upon what the parties have expressed, there being no basis upon which to make any implication or construction; and hence the question is one of fact.

What agreement then is to be implied in the case of an account stated? Clearly it must be an agreement that the account stated shall be taken to be true, at least *prima facie*, for otherwise the stating of an account would go for nothing. On the other hand, it clearly would be wrong to imply an agreement that the account stated shall be taken to be true absolutely, *i.e.*, that neither party shall be permitted to show that it contains any mistakes or errors, or that anything has been omitted from it which ought to have been included in it; for the object of stating an account is not to make a bargain, but to find out the truth. When an account has been stated, therefore, the parties to it, if they be honest, suppose it to be true, and hence any implication of an agreement respecting it must be on the supposition of its being true. If, therefore, that supposition fails, the agreement also fails. How, then, can an account stated be given that binding effect, without which it would be a nullity, and yet be prevented from having a binding effect which the parties to it never contemplated, and which therefore would work injustice? Clearly by implying a conditional agreement, namely, that the account stated shall be

taken to be true, unless (and except so far as) one of the parties to it shall prove mistakes or errors in it, or omissions from it. That such a condition ought to be implied is proved by the prevailing practice of placing at the foot of every account the words, "Errors and omissions excepted," — a practice which is believed never to be departed from, except through inadvertence, or because an express exception is supposed to be unnecessary.¹ In the case of a compromise, on the other hand, as there is no implied *agreement*, so there can be no implied *condition*; and, therefore, in the absence of an express condition, a compromise is absolutely binding. Moreover, such a condition as is implied in the case of an account stated, would be inconsistent with the nature of a compromise; for a compromise is a bargain, the object of which is to supersede the necessity of investigating the facts which are the subject of the compromise, — a bargain, the very essence of which consists in an agreement that certain facts, supposed to be uncertain or doubtful, shall be conclusively taken, as between the parties to the agreement, to be thus and so. Of course the motive of each party in making a compromise is the promotion of his own interests, namely, by obtaining better terms than he thinks he has an even chance of obtaining otherwise, or by saving trouble and expense, or in both of these ways; but whatever the motive, each party acts upon his own knowledge and judgment as to all doubtful facts, and he acts at his peril.²

¹ "It is common to add to a statement of accounts, 'Errors excepted;' I think that such exception must be understood, even where not expressed." Per Lord Campbell, C. J., in *Perry v. Attwood*, 6 El. & Bl. 691, 700.

² "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud." Per Lord Kingsdown, in *McKellar v. Wallace*, 8 Moo. P. C. 378, 401-2.

Of course the same transactions may be the subject of both a statement of account and a compromise; for the parties may first state an account, and then they may agree that the account so stated shall be taken as absolutely true; but in that case the account stated is entirely superseded by the compromise; and as a compromise can be only by express agreement, of course a compromise can never be inferred as a consequence of an account stated.

The result, therefore, is that, while a compromise can be impeached only for fraud, an account stated can be impeached either for fraud or error. If either a compromise or an account stated be impeached for fraud, of course the plaintiff will have the burden of proof, and he will have to establish fraud at the hearing, or his bill will be dismissed. If he succeed in making out a case of fraud, a decree will be made setting aside the compromise or the account stated, and referring the cause to a Master to take an account, just as if no compromise had been made, or no account had been stated.¹ If an account stated be impeached on account of errors or omissions, the plaintiff will also have the burden of proof,² but he will not have to establish errors or omissions at the hearing of the cause.³ On the contrary, he will be entitled to a decree as of course, referring the cause to a Master to take an account; but the Master will be directed, in case he shall find

¹ In *Allfrey v. Allfrey*, 1 M. & G. 87, Lord Cottenham said (p. 93): "The only question in this cause is, whether the decree should be for an open account generally, or a decree to surcharge and falsify. Now the distinction between these two has not been accurately observed in some more recent cases. But if you look to the earlier cases, you will find the rule clearly laid down. In the case of *Vernon v. Vawdry*, 2 Atk. 119, it is said: 'If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it appears to the Court that there has been fraud and imposition, the decree must be, that the whole shall be opened.' . . . I have acted upon that doctrine, affirming a decree of Lord Langdale's, in *Wedderburn v. Wedderburn*, 4 M. & Cr. 41. Now it is quite obvious, that that is, strictly speaking, the doctrine and principle of this Court, because, if a transaction, whether it be a deed, or an agreement, or an account stated and settled, which is only an agreement, be proved to be fraudulent, there is nothing on which it can stand: the transaction itself is void." See also *Coleman v. Mellersh*, 2 M. & G. 309.

² *Dawson v. Dawson*, West, 171, 1 Atk. 1; *Pit v. Cholmondeley*, 2 Ves. 565. There is a distinction, however, between errors and omissions. As to errors, the burden of proof is shifted from the defendant to the plaintiff by the agreement implied by the account stated. As to omissions, on the other hand, the burden of proof simply remains where it always was, namely, with the plaintiff.

³ This is because the items of an account are never investigated at the hearing of the cause, but are always investigated after the hearing and in the Master's office.

an account stated between the parties, to let the same stand, but to permit the plaintiff to surcharge or falsify the same.¹ Under this decree, the plaintiff will be permitted to show that the defendant ought to be debited with certain items which have been omitted from the account; and such items as the plaintiff proves will be added to the account by the Master. This is called surcharging the account.² The plaintiff will also be permitted to show that the defendant has been credited in the accounts stated with certain items with which he ought not to be credited; and such items as he proves to be erroneous will be stricken out by the Master. This is called falsifying the account.³ When the evidence is all in, the Master will make up the account, consisting of the account stated, with such additions and corrections as the proof requires, and report the same to the court.

What has been said as to impeaching an account stated on account of errors or omissions, is applicable to an account which has been stated pursuant to an obligation to account, as well as to an account stated respecting cross demands, or respecting demands, all of which are in favor of the same creditor and against the same debtor, except that, in the former case, the account stated is a thing executed, *i.e.*, it extinguishes the obligation to account, and converts the balance found in favor of the obligee into a legal debt, without regard to errors or omissions; while in the two latter cases the account stated rests merely in agreement, especially as regards errors or omissions; and a consequence of this difference is

¹ *Kinsman v. Barker*, 14 Ves. 579; *Fitzpatrick v. Mahony*, 1 J. & La T. 84. The phrase "surcharge and falsify" is derived from the ancient mode of accounting in equity, according to which the items in every account were all reduced to two classes, namely, items of charge and items of discharge. This mode of accounting was perfectly adapted to an accounting upon a bill for an account, but it was not so well adapted to an accounting upon a bill of equitable assumpsit, *i.e.*, as between debtor and creditor. When applied to this latter species of accounting, the items of charge consisted of the items which made up the indebtedness of the defendant to the plaintiff, while the items of discharge consisted of the payments made by the defendant, with any other items of defence. Under this system a plaintiff and a defendant could not both be accounting parties in the same account. In the case, therefore, of cross demands, as the plaintiff and the defendant were both accounting parties, there had to be two separate accounts, each with its two classes of items.

This mode of accounting was abolished in England by the 61st order of April 3, 1828, by which it was provided "that all parties accounting before the Masters shall bring in their accounts in the form of debtor and creditor." See *Sanders' Orders*, 725.

² *Pit v. Cholmondeley*, 2 Ves. 565.

³ *Pit v. Cholmondeley*, *supra*.

that an account stated, in the former case, can be impeached for errors or omissions in equity alone, while, in the two latter cases, so far as it can be proved to be erroneous or defective, it is invalid both at law and in equity.¹

It remains to speak of an important distinction between an accounting pursuant to an obligation to account, and a statement of accounts respecting cross demands, — a distinction which has already been alluded to more than once, but which requires to be examined with more particularity. An accounting pursuant to an obligation to account is an extinguishment of one cause of action, and the creation of another in lieu of it. It is, therefore, at once a defence and a cause of action, — a defence to an action on the obligation to account, and a cause of action to recover the balance found in the plaintiff's favor, which balance is a debt created by the accounting. A statement of accounts respecting cross demands, on the other hand, extinguishes nothing of the original demands, except indirectly, namely, by means of a set-off, and creates no new right of action, except a right of action on an executory agreement, and the balance which is found in favor of one of the parties is not a new debt, but a portion of that party's original debt, namely, so much of it as has not been extinguished by the set-off. One consequence of this distinction is, that, in an action or suit to recover a balance found in the plaintiff's favor, such balance should be described, in the one case, as a debt due upon an account stated, in the other case, as a debt due for the same cause as the plaintiff's original demand. Another consequence is that if a claim be sued for which has been extinguished, either by or in consequence of the statement of an account, the defence will be, in the one case, an account stated, in the other, payment. Clear as this distinction is in principle, it has never obtained any recognition in equity, — a fact which considering that no distinction between the two kinds of accounting has ever been recognized in equity, is not surprising. What is surprising, however, is the fact that the distinction in question has obtained only partial recognition at law, and the further fact that there is an absolute inconsistency between the recognition of it at law, on the one hand, and the failure to recognize it, on the other hand. Thus, it is perfectly clear that "accounts stated" was never a good plea at law, except to an action

¹ Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, if the seventh plea had been good, the replication would have been a good legal answer to it.

of account (in which case it took the name of *plene computavit*); and of course it follows that no action should lie upon an account stated, unless the account stated be one which might formerly have been enforced by an action of account. Yet, with extraordinary inconsistency, and through an extraordinary perversion of the *indebitatus* count in assumpsit upon an account stated, it is held that that count is available, not merely in all cases where an account has been stated respecting cross demands, but in all cases where there has been even a verbal admission by the defendant that he owed a certain sum to the plaintiff, though there have never been any cross demands, nor any formal statement of account between the parties. That this is a perversion of the count upon an account stated there can be no doubt. That count had its origin in the action of debt for arrearages of account,—a form of action (or rather a form of count) devised expressly and exclusively for cases in which a balance had been found in the plaintiff's favor upon an accounting by the defendant pursuant to an obligation to account, and such balance remained unpaid, *i.e.*, for cases in which the proper action would have been account, but for the fact that there had already been an accounting, and hence an action of account would be met by a plea of *plene computavit*. When the action of debt on simple contract came to be superseded by *indebitatus* assumpsit, the count in debt for arrearages of account was converted into the count upon an account stated in assumpsit; and, therefore, the latter should have remained subject to the same limitations to which the former was subject; and so it did for a time.¹ But with the disuse of the action of account, the proper function of the count upon an account stated was lost sight of, and hence its proper limitations soon came to be disregarded. One of the minor evils consequent upon this departure from principle has been that the count upon an account stated has ceased to be (what it once was) a test of the cases in which an action of account would formerly lie, and in which therefore a bill for an account will now lie.

When the count upon an account stated had been thus extended beyond its true bounds, consistency required that the defence of

¹ *Hamond v. Ward*, Styles, 287. 1 Lilly's Pr. Reg. 30, decided in Trinity Term, 1651. The form of the action appears to have been debt upon an account stated, but the view of the court clearly was not based upon any supposed distinction between debt and assumpsit.

account stated should be extended in like manner; for whenever a plaintiff is permitted to sue upon an account stated as a new cause of action, he ought to be precluded from suing upon the old cause of action which was the subject of the accounting; and accordingly, in one case,¹ in the time of Chief Justice North, it was held to be a good plea to an action of *indebitatus* assumpsit that an account had been stated respecting the debts for which the action was brought; but that decision was overruled in the time of Lord Holt, the latter saying of it: "The case quoted out of the Moderns was the first of this kind, and by my consent shall be the last. And to plead it as an account is but argumentative of payment (which is direct), and therefore not to be allowed."² Other cases,³ which soon followed, established conclusively that account stated is no plea, except to an action of account; and yet, in every case in which it was so decided, the court would have held that the plaintiff might have declared upon the account stated, and that the declaration upon it would have been supported by the evidence. And this strange inconsistency has continued to exist to this day, and that too without ever having attracted attention.

C. C. Langdell.

[To be continued.]

¹ *Milward v. Ingram*, 1 Mod. 205, 2 Mod. 43, Freem. 195. North, C. J., said (2 Mod. 44): "There are two demands in the declaration, to which the defendant pleads an account stated, so that the plaintiff can never after have recourse to the first contract, which is thereby merged in the account. If A sell his horse to B for £10, and, there being divers other dealings between them, they come to an account upon the whole, and B is found in arrear £5, A must bring his *insimul computassent*; for he can never recover upon an *indebitatus* assumpsit."

² *May v. King*, 12 Mod. 538.

³ *Atherley v. Evans*, Sayer, 269; *Roades v. Barnes*, 1 Burr. 9; *Thomas v. Heathorn*, 2 B. & Cr. 477; *Callander v. Howard*, 10 C. B. 290.

DAVIES v. MANN: THEORY OF CONTRIBUTORY NEGLIGENCE.

THE importance of the case of *Davies v. Mann*¹ consists in this, that it led the way in introducing a principle, now firmly established in England, which was a distinct addition to the theory of contributory negligence. The general result of the cases² before *Davies v. Mann*, none of them, however, being of commanding importance, except, perhaps, *Butterfield v. Forrester*, is embraced in the proposition, that if the plaintiff was guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover.

Davies v. Mann was decided in 1842. The facts, substantially as set forth in the reported case, are as follows: The plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, where at the time of the injury it was grazing, on the off side of a road about eight yards wide. The defendant's wagon, with a team of three horses, coming down a slight descent at what a witness termed "a smartish pace," ran against the ass and knocked it down, inflicting injuries from which it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

In addition to other instructions, the judge at the trial directed the jury, that "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

During the argument in the Court of Exchequer, Parke, B., pointed out that it must be assumed that the ass was lawfully in

¹ 10 M. & W. 546.

² *Butterfield v. Forrester*, 11 East, 60 (1809); *Vanderplank v. Miller*, M. & M. 169 (1828); *Lack v. Seward*, 4 C. & P. 106 (1829); *Vennall v. Garner*, 1 C. & M. 21 (1832); *Pluckwell v. Wilson*, 5 C. & P. 375 (1832); *Williams v. Holland*, 6 C. & P. 23; s. c. 10 Bing. 112 (1833); *Luxford v. Large*, 5 C. & P. 421 (1833); *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244 (1838); *Raisin v. Mitchell*, 9 C. & P. 613 (1839).

it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann*, supported in that of *Tuff v. Warman*, and other cases, and has been universally applied in cases of this character without question."¹

This opinion was assented to by Lord Blackburn and Lord Gordon, and emphatically by Lord Cairns. In the recent case of *The Bernina*, Lord Esher² and Lord Justice Lindley³ stated the law substantially in the same terms.

The case of *Davies v. Mann* being thus approved and established in England, and also in Ireland,⁴ is generally stated to be law in the United States;⁵ but a very brief examination of cases will show that *Davies v. Mann*, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover.⁶ The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and *Davies v. Mann* is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory.⁷

From American text-writers, on the other hand, the case of *Davies v. Mann* has met with great disapproval. It has been

¹ 1 App. Cas. 758-9.

² 12 P. D. 61, (5.)

³ 12 P. D. 89, 3, (6.)

⁴ *Scott v. Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377.

⁵ "We know of no court of last resort, in which this rule is any longer disputed." *Shearman and Redfield, Negligence* (4th ed.), § 99.

⁶ "The rule in *Davies v. Mann* has been misunderstood and misapplied. It means only that negligence upon the part of the plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury," etc. *Patterson, Railway Accident Law*, 55.

⁷ "In *Davies v. Mann*, 10 M. & W. 546, the plaintiff negligently left his donkey in a public street, with his fore legs fettered, and the defendant drove over him carelessly. It was held that the plaintiff could recover, notwithstanding his negligence, it being a condition, but not a contributing cause, of his injury." *Marble v. Ross*, 124 Mass. 44, 48, per Morton, J.

attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence.¹

As this case is a qualification upon the general doctrine of contributory negligence, let us first inquire what is the foundation of that doctrine itself. One view, and perhaps the prevailing view, is, to ascribe it to the maxim, *in jure non remota sed proxima causa spectatur*.² The plaintiff cannot recover because he is himself the proximate cause of the injury; and conversely, a plaintiff's negligence in order to defeat his action must be a proximate cause. Another view is that the plaintiff is in the condition of a joint tortfeasor, seeking to recover indemnity for his own wrong.³ A third view is, that the plaintiff is disentitled because he is himself partly to blame for the injury. This last may not be properly classified as a distinct view or theory of the subject, but rather as another method of stating either or both of the first two views; but it is a form of statement which points to a moral standard as the foundation of the law, and has the sanction of use by a judge of the highest rank and authority.⁴ Still other views have been advanced, as that the plaintiff falls under the maxim *volenti non fit injuria*. But a series of cases in England under the Employers' Liability Act of 1880 has brought out so clearly the distinction between contributing to an injury by an act or omission, which is or may be contributory negligence, and consenting to it without a negligent act or omission, which is the case intended by the maxim, that further discussion of that view is superfluous.⁵

In the light of those theories let us examine *Davies v. Mann*.

¹ 2 Thompson, Negligence, 1156; Beach, Contributory Negligence, 10, 11 *et passim*; Bishop, Non-Contract Law, § 463, note 2; Contributory Negligence and the Burden of Proof, N. Y. St. Bar Ass. 6: 198, by Edward E. Sprague, Esq., being the Prize Essay of 1882. This is a strong but discriminating condemnation of the rule in *Davies v. Mann*.

² "It [contributory negligence] rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." *Thomas v. Quartermaine*, 18 Q. B. D. 685, 697, per Bowen, L. J. So Pollock, Torts, 374; and Wharton, Negligence, § 133.

³ Sprague, Contributory Negligence and the Burden of Proof, 3, 4 (in pamphlet); Bishop, Non-Contract Law, § 460.

⁴ Lord Blackburn, in *Cayzer v. Carron Company*, 9 App. Cas. 873, 880, 881.

⁵ *Weblin v. Ballard*, 17 Q. B. D. 122; *Thomas v. Quartermaine*, 17 Q. B. D. 414; 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; *Thrussel v. Handyside*, 20 Q. B. 359; *Osborne v. London & North Western Ry. Co.*, 21 Q. B. D. 220; *Members v. Great Western Ry. Co.* 14 App. Cas. 179.

The plaintiff's negligence consists in the act of leaving the donkey fettered in the highway. That is the last act done by him before the accident, and his subsequent intervening conduct has no connection with the case. For the accident which follows, applying the test of moral or personal blame, if he had ordinary intelligence, he is to blame at least in part, and there are strong grounds for holding him as much to blame as the defendant. His want of care and the defendant's want of care are each necessary elements in the result. Remove either, and the mischief would not have happened.

If, again, a man guilty of contributory negligence is to be treated as a joint tort-feasor, the plaintiff in *Davies v. Mann* is a joint tort-feasor, and is seeking to obtain indemnity for his own wrong. The damage complained of is the result of his negligence and the defendant's negligence conjoined. But this is an inapt and unfortunate form of statement; for a joint tort-feasor the plaintiff cannot be. He owes no legal duty to himself to take due care of himself or of his property, and as he has violated no legal duty to the defendant and done him no damage, he has committed no tort. Whatever of truth there is in this theory of contributory negligence, — the same principle being also sometimes put in the forms that the plaintiff must come into court with clean hands, and that no man can take advantage of his own wrong, — is embraced under another principle, not yet mentioned, to be discussed below.

Finally, if a plaintiff cannot recover because his negligence is a proximate cause of the injury, the negligence of the plaintiff in *Davies v. Mann* is, in the legal meaning of the phrase, though not perhaps in its logical or metaphysical meaning, a proximate cause. Speaking generally, if a man does or omits to do an act which is likely to result in damage, under all the circumstances known and which ought to be known to him at the time, his act or omission is the legal cause of that damage. Now in *Davies v. Mann* the plaintiff did an act which was likely to result in damage, and which did so result. The opinion of the court conceded that it was an act of negligence, and it was contributory negligence; for although not directly conceded by the court to be contributory, that concession is understood by the English courts to be involved in the principle of the case, particularly by the House of Lords, in the passage above quoted from Lord Penzance.

If the negligence of Davies was contributory, it was also a proximate cause, for on the theory of proximate causes remote negligence is not contributory, and is not, legally speaking, a cause at all, but is disregarded. *In jure non remota sed proxima causa spectatur*. It follows that in *Davies v. Mann* the plaintiff violates every one of the principles thus far given as the foundation of the law of contributory negligence. Yet he is allowed to recover.

It is submitted that there is another principle upon which to rest the law of contributory negligence. When a plaintiff seeks redress in a court of law for a tort, the rule which the court may apply will not only settle the dispute against him or in his favor, but it will have a further and more lasting office as a precedent binding upon all members of the community in a similar case. The community, therefore, has an interest in the result, and the needs of the community should have an influence upon the rule to be laid down. That they do have an influence is beyond dispute.¹

In an action for negligence it is of no consequence to the law whether the particular defendant shall be compelled to pay damages, or whether the loss shall be allowed to lie where it fell. The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in future. The reason why a plaintiff who is guilty of contributory negligence can recover no damages is to a large extent a matter of sound policy or legislation; and this view has been suggested at least, if not directly stated, by judicial authority. In the Ohio case of *Davis v. Guarnieri*, Owen, C. J., in laying down three considerations upon which the doctrine of contributory negligence is based, gives this as the last: "(3) The policy of making the personal interests of parties dependent upon their care and prudence."² Why the common law in cases of contributory negligence should not divide the loss is a question to which different answers have been suggested,³ but which remains a puzzle to judges of great ability;⁴ just as the opposite rule in Admiralty,

¹ See Holmes, Common Law, p. 35, for a fine passage upon this topic.

² 45 Ohio St. 471, 489.

³ Bishop, Non-Contract Law, § 460, note 3.

⁴ Per Lindley, L. J., 12 P. D. 58, 89.

which does divide the loss, has perplexed high authorities among the civilians.¹ But the practice being thus established of depriving the plaintiff of all remedy, the ultimate justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of due care set by the law. If he does not, he is deprived of the assistance of the law. How much influence the rule exerts to accomplish the object aimed at cannot be known. That it does exert some influence is sure. A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict is likely to be more careful in future. From his negligence, at least, accidents will be less likely to happen.

The general doctrine of contributory negligence being thus founded upon considerations of policy, the rule in *Davies v. Mann*, which is a part of that doctrine, rests upon the same ground. The plaintiff negligently left the donkey fettered upon the road, and the defendant some time afterward carelessly ran over it. To prevent an injury is a better service than to award compensation for an injury already done; and if it be any part of the policy of the law to prevent accidents, and if it have any means at its command to accomplish the object, the negligence of the defendant in *Davies v. Mann* is the negligence at which the law ought to strike. The negligence of the plaintiff having placed the animal in a situation of danger, the defendant had a full opportunity to avoid the peril by due care, which he did not use. The negligence of each is a necessary element, but that of the defendant is nearer to the accident. The plaintiff did an act from which harm was likely to follow; from the defendant's negligence harm was bound to follow.

It may be said that this is merely another way of stating that the negligence of the defendant is the sole proximate cause, and that of the plaintiff remote, and therefore the whole question comes back to the theory of proximate cause. The answer is, that although the negligence of the plaintiff is more remote from the accident than that of the defendant, it is still near enough to be contributory negligence, and is so conceded to be by the House of Lords, and is therefore a proximate cause; and on the theory of contributory negligence which holds that a plaintiff is disentitled

¹ See Marsden, *Law of Collisions* (2d ed.), 132-134.

to recover whenever his own negligence is a proximate cause of his injury, the plaintiff in *Davies v. Mann* ought not to recover. Another suggestion which may be made by the advocate of proximate causes is, that the negligence of the defendant in *Davies v. Mann* succeeded that of the plaintiff in time, and that the effect of the case is to decide that where there are several causes, the last cause to operate in point of time is the true proximate cause. The answer is, that the rule in *Davies v. Mann* does not inquire whether the defendant was guilty of the last negligence, but only whether he had an opportunity to avoid the accident by the use of due care. If he had, and the plaintiff had not, which was the fact in *Davies v. Mann*, he is liable.

Before proceeding to examine more closely the application of the rule in *Davies v. Mann* to different conditions of fact, a matter by no means free from difficulty, two other points of a general nature must be noticed.

1. To compel the defendant in *Davies v. Mann* to pay the whole damage, when the plaintiff is also at fault, may be said to operate as a punishment upon the defendant. So it may also be said that to deprive the plaintiff of all compensation in other cases of contributory negligence, where the rule in *Davies v. Mann* does not apply, and where the negligence of the plaintiff may be only a small element in the accident, operates as a punishment upon him. It may be conceded that there is a punitive element in each of those cases ; and if the law of contributory negligence is founded upon considerations of policy, the punitive element can be readily explained and understood.

2. But it may be asked, if the idea of punishment is involved in *Davies v. Mann* at all, why does not that admit the doctrine of comparative negligence which prevails in Illinois and several other States? By that rule, "the degrees of negligence must be measured and considered ; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."¹ It is perfectly plain that there is no logical connection between the rule in *Davies v. Mann* and the doctrine in the passage quoted, which is from the case where comparative negligence first appeared. No comparison of the negligence of the plaintiff and of the defendant is made

¹ *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478, 497, per Breese, J. (1858)

in *Davies v. Mann*. The question is, Can the defendant avoid the consequences of the plaintiff's negligence? If he can, then, although his negligence may be slight in comparison with that of the plaintiff, he is obliged to pay the whole damage.

It remains to apply the rule in *Davies v. Mann* to cases with different facts.

1. Suppose the defendant, or the driver, in *Davies v. Mann*, instead of being a short distance behind his horses, had stopped by the way in a public house, and allowed the horses to go on ahead, and that when the accident occurred he was a mile behind them, and they were not in sight. What rule is to be applied? Neither plaintiff nor defendant is on the ground at the time of the accident, and the negligence of the defendant consists in allowing the horses to go on alone. His negligence is equally remote from the accident with that of the plaintiff, and although it may be more blameworthy to allow a team of three horses to go alone upon the highway than to leave a donkey fettered there, that cannot affect the result. The rule in *Davies v. Mann* requires the defendant to use due care to avoid the consequences of the plaintiff's negligence, but in this case he could not, after the peril was imminent, do anything to avoid the accident. The principle of *Davies v. Mann* has therefore no application, and the case falls under the general proposition of contributory negligence. The plaintiff's negligence contributes to his injury, and he cannot recover.

In the Pennsylvania case of *Stiles v. Geesey*,¹ the facts were similar to those here supposed, and the plaintiff failed in his action, upon the general ground that he was guilty of contributory negligence. The relation of *Davies v. Mann* to the case was not considered.

2. Suppose the plaintiff in *Davies v. Mann* was himself actually present by the roadside at the time of the accident, and negligently allowed the donkey to remain in the way of the approaching team, the other facts remaining unchanged. In this case, by the use of due care, he could avoid the injury as well as the defendant. It is his duty so to do, and on these facts it is submitted he could not recover. It would be the grossest inequality and injustice to impose upon the defendant the duty of avoiding the consequences

¹ 71 Penn. St. 439.

of the plaintiff's negligence where he can do so by the use of due care, unless a corresponding duty were imposed upon the plaintiff.

This result also follows as a matter of authority from *Butterfield v. Forrester*.¹ There, the plaintiff, while riding violently through the streets of Derby at nightfall, ran against an obstruction which had been placed across the highway by the defendant, and fell, with his horse. After a verdict for the defendant, Lord Ellenborough, in refusing a rule for a new trial, said: "One person being in fault will not dispense with another's using due care for himself. Two things must concur to support this action: an obstruction in the highway, and no want of ordinary care to avoid it on the part of the plaintiff."² In *Butterfield v. Forrester*, the defendant was not present at the time and place of the injury, and in that respect the case differs from the one here supposed; but *Butterfield v. Forrester* imposes upon the plaintiff the same duty of avoiding the consequences of the defendants's negligence, which in *Davies v. Mann* is imposed upon the defendant to avoid the consequences of the plaintiff's; and that duty, if it exists at all, must exist when the opposite party is present as well as when he is absent. *Butterfield v. Forrester* has been said to be irreconcilable with *Davies v. Mann*;³ but in answer to that criticism it may be observed that *Butterfield v. Forrester* was referred to with approval by Baron Parke in *Bridge v. Grand Junction Ry. Co.*, in a passage which he quotes and reaffirms in *Davies v. Mann*. Moreover, it is one of the oldest cases in the law of contributory negligence, having been decided in 1809, and has ever since been unquestioned law. So far from being in conflict with *Davies v. Mann*, it is the exact converse⁴ of *Davies v. Mann*; and the two cases are to be considered as illustrations of the working of the same great principle,—the duty of one person to avoid the consequences of another's negligence,—applied to different facts.⁵

¹ 11 East, 60.

² 11 East, 61.

³ "The two rules, placed side by side, as some courts are in the habit of placing them, contradict each other and make nonsense." 2 Thompson, Negligence, 1155.

⁴ See *The Bernina* 12 P. D. 58, 62, (8) per Lord Esher; and *id.* 89, 3, (a) per Lindley, L. J.

⁵ An article reviewing Beach on Contributory Negligence, in 2 Law Quarterly Review, 506, presumably from the pen of Sir Frederick Pollock, by adding certain facts in *Radley v. London & North Western Ry. Co.*, presents a case similar, but not identical, with that presented above, by changing the facts in *Davies v. Mann*. The *Radley* case was an action for negligently pushing empty trucks against the plaintiff's bridge, whereby it was thrown down, the plaintiff or his servants not being at the time on the ground. The

3. Suppose that the plaintiff in *Davies v. Mann* was present by the roadside with the donkey, and that half an hour before the accident occurred he had fallen asleep, and was asleep at the time of the accident, the other facts remaining the same. What rule is to be applied? In *Davies v. Mann*, Baron Parke puts the case of negligently running over a man lying asleep in the highway, and implies that the injured man could recover. If so, it follows that the duty of the plaintiff to avoid the consequences of the defendant's negligence exists only when the plaintiff has full capacity, after the peril is imminent, to use due care.

4. Again, it may be supposed that the plaintiff in *Davies v. Mann* was present at the time of the accident, but so intoxicated that he was incapable of exercising care. What rule is to be applied? This case is like the last in this respect, that the plaintiff in point of fact has no capacity to avoid the accident, any more

additional facts supposed were, that a servant of the plaintiff was on the bridge after it was in imminent peril, but stood by and failed to give the alarm; while the defendant's servants felt the resistance of the bridge soon after the plaintiff's servant saw it in danger, and instead of stopping the trucks to investigate, stupidly pressed on. The learned author of the article referred to assumes that the plaintiff could still recover, and sums up the law in this general rule: "The result is, that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it; and this will be found, we believe, to be true in all such cases, whether the series be long or short." This rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and if the assumption is correct, it follows logically that the person guilty of the last negligence, whether it be an act or an omission, is alone responsible; for his negligence is the sole proximate cause. It also follows logically that wherever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and that the rules of contributory negligence can apply only where the negligence of the plaintiff is concurrent and simultaneous with that of the defendant. But the cases of *Davies v. Mann* and *Radley v. London & North Western Ry. Co.* are cases of successive negligence, and are considered by the courts to be cases of contributory negligence also. This shows that the logical theory of proximate causation is not the basis, or, at any rate, not the sole basis, of contributory negligence.

In the case where both plaintiff and defendant have been guilty of negligence contributing to the accident, and both are present at the time of the accident, the true question is believed to be this: Could the accident, after the peril was imminent, be avoided by either party, by the use of due care? If it could, the one who fails to use due care to avoid, cannot recover. It cannot be said as matter of law, when both parties are present, that it is negligence on either side not to avoid, or to take precautions to avoid, the consequences of the other's negligence. Thus in *Spaight v. Tedcastle*, 6 App. Cas. 217, both parties were present at the time of the accident, and the plaintiff recovered, but on the ground that he, or the pilot in charge of his vessel, was not guilty of any negligence when the peril was imminent. *Washington v. Baltimore & Ohio R.R. Co.*, 17 W. Va. 190, which presents similar facts, and contains an elaborate review of authorities, goes upon the same ground.

than if he was not upon the ground. But in this case the incapacity is due to a cause which the law ought to restrain. The general rule undoubtedly is, that if a man is injured while intoxicated, the intoxication alone is not a bar to his action.¹ But an intoxicated man is in constant danger of inflicting harm through negligence, and if, while in that state, he receives an injury through negligence of another, which he has no capacity to avoid, why may not the law say, upon grounds of policy, that his incapacity, being due to his own folly, shall be no excuse? Upon authority, however, it must be said that this case has been put several times by judges, and always with the implication that the plaintiff could recover.² In *Nashville & Chattanooga R. R. v. Smith*,³ plaintiff's intestate was intoxicated and on the track of the defendant at the time of the accident, and the same was the fact in *O'Keefe v. Chicago, Rock Island, & Pacific R. R.*,⁴ and in *Button v. Hudson River R. R. Co.*⁵ But in each of those cases the result was made to depend upon general questions, the rule in *Davies v. Mann*, or the duty or capacity to avoid the accident after the peril is imminent, not being clearly presented or discussed.

5. It is obvious that the last two cases considered may also arise with reference to the defendant. Suppose that in *Davies v. Mann* the driver at the time of the accident had been asleep upon his wagon, or so drunk that he was incapable of using due care to avoid the donkey, the other facts remaining the same. The case where the driver is intoxicated has been put by way of illustration from the bench,⁶ with a strong implication that the plaintiff might

¹ 2 Thompson, *Negligence*, 1174.

² "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury." Coleridge, J., in *Clayards v. Dethick*, 12 Q. B. 439, 445. So Blackburn, J., in *Radley v. London & North Western Ry. Co.*, L. R. 10 Ex. 100, 105; Ellsworth, J., in *Isbell v. New York & New Haven R. R.*, 27 Conn. 393, 404.

³ 6 Heisk. 174.

⁴ 32 Iowa, 467.

⁵ 18 N. Y. 248.

⁶ "If in *Davies v. Mann* the driver of the wagon, if in *Tuff v. Warman* the crew of the steamer, had become half an hour before the collision so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendant in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost muscular power, the defendants would be exempt from all responsibility, according to rule of instruction for the jury suggested by the thirteenth exception." *Scott v. Dublin & Wicklow Ry. Co., Ir. R.* 11 C. L. 377, 395, per Pigot, C. B.

recover. There can be little doubt that this is the result which would be reached by the court in a case like the one supposed. But it is submitted that the same rule should be applied to a plaintiff in the like situation ; and that wherever one person, present at the place of the accident, is incapacitated, by a cause due to his own fault, from using due care to avoid the consequences of another's negligence, he should be held to the same standard of care as if the incapacity did not exist.

The results of these several cases, and of the discussion thus far, may be summarized thus :—

The general rule of contributory negligence, founded largely, if not wholly, upon considerations of public policy, is this : that if a plaintiff has been guilty of any negligence which contributed proximately to the injury, he cannot recover. But it is the duty of both plaintiff and defendant to use due care to avoid the consequences of each other's negligence. If the defendant alone can avoid the accident by the use of due care, and does not, the plaintiff may recover. If the plaintiff alone can avoid it, and does not, he cannot recover. If both can avoid it, neither can recover. If neither can avoid it, the general rule applies, and the plaintiff cannot recover.

A few more questions remain to be considered. It has already been said that the principal objection to the rule in *Davies v. Mann* is, that it does away with the entire law of contributory negligence. *Davies v. Mann*, it is said, decides that the plaintiff can recover damages for an injury sustained by him if the defendant by the use of due care could avoid doing the injury. But a defendant is never liable for negligence except in the case where he could avoid doing the injury by the use of due care. Therefore, negligence of a plaintiff is never a bar to his action. The answer is, that the rule of *Davies v. Mann* does not apply to every case of contributory negligence, but only to those cases where the defendant is on the ground and by the use of due care can avoid the injury. Outside of that limited class of cases the general rule, embraced in the first proposition of Lord Penzance, has full and unrestricted application.

It has been suggested that the rule in *Davies v. Mann* should be modified in the manner following : " Although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the

injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." ¹ In *Davies v. Mann* the defendant did not discover the peril before the accident, but he was held bound to use due care independent of the fact of discovery, so that the rule here suggested is a different rule from that in *Davies v. Mann*.² If the defendant had discovered the peril and had not used due care to avoid it, that fact would be strong evidence, and in some cases almost conclusive evidence, of wilfulness. And, as has been already stated, if the act of the defendant is wilful, negligence is out of the case. The discovery of a danger, under the rule in *Davies v. Mann*, is of no importance except in so far as it tends to prove wilfulness.

Finally, in an able essay already referred to, it is urged that the rule in *Davies v. Mann* should be discarded, and that there are two other well-established principles "which fix liability upon a defendant in every case where liability can properly be imposed."³ Those principles are: (1) that remote negligence of the plaintiff is not in law contributory, and (2) that contributory negligence is no defence for a wilful wrong. But if the suggestions here offered are well founded, the rule in *Davies v. Mann* has a field of usefulness outside of either of those principles; and it rests upon sufficient grounds.

William Schofield.

CAMBRIDGE, December, 1889.

¹ 2 Thompson, Negligence, 1157, note 1.

² The rule requiring a defendant to use due care to avoid the consequences of discovered negligence prevails in several States. See *Isabel v. Hannibal & St. Joseph R. R.*, 60 Missouri, 475; *Morris v. Chicago, Burlington, & Quincy Ry.*, 45 Iowa, 29; *Woods v. Jones*, 34 La. Ann. 1086.

³ Sprague, Contributory Negligence and the Burden of Proof, p. 7 (in pamphlet)

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2 50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
HERBERT H. DARLING,	CHARLES I. GIDDINGS,
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUNT,	HENRY SCHOFIELD,
CHARLES E. SHATTUCK,	AARON C. THAYER,
EZRA R. THAYER.	

THE attention of third-year students is called to an announcement by the Law School Association that the last day for receiving essays for their annual prize is postponed until April the fifteenth. The increase during the past year in the membership of the Law School Association, which appears by the treasurer's report for 1889, is remarkably gratifying. A gain of one hundred and fifteen members now brings the total up to nine hundred and sixty-three. The Association is in every respect such a credit and substantial help to the Law School that any appearance of life or activity on its part is comforting. Every one who heard or read the proceedings of the Association meeting in 1886 will join in the hope expressed by the treasurer, that this year again the Association will have a meeting, dinner, and an oration.

THE distrust of their legislative bodies shown by Americans has been commented on at length by Mr. Bryce in his "American Commonwealth." It is brought out clearly in the case of *Adair v. Ellis*.¹ The case was decided on the ground that the legislature had no power to pass a law permitting the counties to levy a tax to pay insolvent costs due to a solicitor-general, as they are not court expenses. Simmons, J., says: "Let us adhere to a strict construction of the Constitution, at least so far as taxing the people is concerned. No man knows how soon the legislature, city governments, and county governments may be in the hands of non-taxpayers. These restrictions, which are now so much complained of, will then be . . . a barrier against those who desire to put their hands in the public treasury."

This puts rather bluntly the cause of the manifold petty restrictions which are found in recent American constitutions. They are drawn with the idea that the chosen representatives of the people will rob the State to the extent of their ability, and therefore any restriction of their power is so much money saved. This would seem to lead to the conclusion that we should have no legislatures at all; but large powers must of necessity be given to the legislative body, and, if that is corrupt, no constitution in the world can prevent the most serious conse-

¹ 10 S. E. Rep. 117 (Ga.).

quences. So our State constitutions, like the national, should assume that the representatives will act conscientiously, and leave it to the voters to see that they do.

MR. JAMES C. CARTER's address on "The Provinces of the Written and the Unwritten Law," delivered last July before the Virginia State Bar Association and since published in pamphlet form, is a very striking and valuable contribution to the discussion of codification, on which so much has been already written. The address is largely devoted to showing the impossibility on theoretical grounds of codifying the private law as distinguished from the public law, which Mr. Carter thinks should be in great measure written. The law, he says, "springs from and rests upon the social standard or ideal of justice," and this social standard of justice is in the case of the unwritten law ascertained and declared by the judges, the "experts selected by the people for the purpose," whose duty it is to examine the new combinations of facts as they arise, and to "discover" the principles of justice which apply to the case. To seek to lay down in advance fixed rules to cover all of these infinitely varied combinations he regards as futile; to do less is the work of the digester rather than the codifier proper. The essay also deals with the subject historically, and in its practical bearings.

Justice cannot be done to Mr. Carter's argument by any such faint sketch as this. While it may be open to some criticism,—for instance, as has been pointed out by the "Nation" of Nov. 28, in that it apparently has something to say of an "abstract and absolute justice" existing independently of human society,—it is certainly a very strong and remarkable document. Mr. David Dudley Field's reply in the "Albany Law Journal" of Dec. 14 is sufficiently vivacious and vigorous, but can hardly be treated as ingenuous criticism; it does not appear to deal with the body of Mr. Carter's argument.

Mr. Field, as is well known, has for many years been a member of the various code commissions in New York, and took an active part in drawing up the proposed civil code (commonly known as the Field code) which, with the code of evidence, is still before the New York Legislature. Mr. Carter, representing the New York Bar Association, has been of the foremost opponents of these codes.

A GOOD many people seem to think that the judges in *MacNaghten's Case* have not had the last word on the question of insanity as a defence to the charge of homicide. The progress of the science of medicine during the last half-century, it is urged, has suggested so many new considerations that the law is likely to undergo restatement within the next few years. Recently Sir James Crichton-Brown, in an article on "Responsibility in Mental Diseases,"¹ has put forward the demands of the medical profession, at the same time proposing a novel means for bringing about a reconciliation between old and new notions as to the legal effect of insanity. First, he emphasizes the value of expert testimony; and, secondly, he advocates the formation of a commission of competent and unbiassed authorities—half doctors and half lawyers—to conduct a series of skilled and sustained observations on homi-

¹ Popular Science Monthly, Nov., 1889, p. 81.

cides who have escaped punishment on the plea of insanity, and the publication of the results of their investigations. Thus, it is hoped, doctors and lawyers may come to an agreement on the question of insanity and crime. The objective point of agreement in Dr. Crichton Brown's estimation is a new legal test of insanity in some such form as this : Could he or she help it ; *i. e.*, is there an impairment of will, or even of self-control, caused by defective mental power or by disease affecting the mind? The present test of legal insanity is too narrow, because it does not recognize a class of lunatics who may understand the nature and effect of their deeds, and who are, nevertheless, irresponsible. These are the persons subject to emotional insanity or irresistible impulse.

We doubt if Dr. Crichton-Brown has suggested a test for legal insanity that is destined to prove any more satisfactory than the test laid down in *MacNaghten's Case*. The proposed test, in the first place, brings into court questions of very great nicety, — questions, in fact, so refined that a jury could hardly deal with them. Secondly, the new test does not discriminate carefully enough between those weak minds which the law punishes rightfully, and others which should be allowed the refuge of the word "insanity." The policy of the law is not to let off a person because he cannot resist temptation ; but, on the contrary, to punish just those whose will do not seem able to resist the motives for crime.

If the courts of common law ever take into consideration the whole field of scientific criminology, of which insanity is but one part, and review all the facts bearing on the nature of the criminal under examination, looking at his history, physical and psychical characteristics, mental and moral development, then the finest discrimination can be made, as to the punishment of those who have shown criminal weakness. But when that time comes we fancy that the new test will be found of little practical value. Until that time the simple test of *MacNaghten's Case* seems likely to be satisfactory, because it relieves from the operation of the law a class of unfortunates who would fare equally well under any just system of criminal law, and it does not liberate persons of questionable irresponsibility.

THE doctrines of the Positive School of Criminology do not seem to be gaining ground among lawyers very rapidly. The necessity of absolute elimination of a certain criminal element from society as a condition of social progress, which has been maintained so strenuously by Garofalo, is emphatically denied by the new Zanardelli code, which abolishes the death penalty in Italy. This is on the very stamping-ground of the Positivists, and in spite of their efforts. Lombroso, Garofalo, and Ferri, the champions of this new school, are all Italian scholars, though they draw their inspiration from Darwin and Spencer. Moreover, Italy is but following the example of the other European nations, hardly one of whom, with the exception of England, now inflicts the death penalty.

More recently still the Judicial Congress of Lisbon has promulgated opinions which do not profess to follow, and do not in fact follow, positive notions as to the treatment of criminals. The Congress was composed of jurists and lawyers from Spanish and Portuguese speaking countries

who assembled for general discussion of legal questions. The section on Criminal Law took up the following question: In what way is it urgent to reform the criminal codes in respect to criminal responsibility in order to bring the theory of the law into accord with the doctrines of modern psychology, criminal anthropology, etc., and at the same time to satisfy the necessity of giving society all possible security against criminals? Their conclusions were embodied in three resolutions, which were approved by a majority of the General Assembly:—

1. Penal laws ought to provide not only for the insane, but for those delinquents who, without being absolutely mad, nevertheless are not entirely responsible for their actions.

2. The delinquent who has been shown by medical examination and all other legal means to be absolutely mad, should be confined for life in a hospital or asylum.

3. Those who, though not absolutely mad, are yet partly irresponsible and dangerous, should be tried and temporarily confined in places designed for them.¹

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY—EXCLUSIVE AGENCY TO SELL.—An exclusive agency to sell merely prohibits the appointment of another agency for the sale of the property, but does not prevent the owner himself from making a sale. *Dole v. Sherwood et al.*, 43 N. W. Rep. 569 (Minn.).

CONFLICT OF LAWS—ASSIGNMENT FOR BENEFIT OF CREDITORS.—In an assignment for the benefit of creditors, made in Dakota, where preference is allowed, by a resident of Minnesota, a policy of insurance on property in Dakota, which had been destroyed by fire, passed to a creditor in Minnesota, where preference is not allowed. *Held*, the assignment, being of a claim owned by a citizen of Minnesota, though good in Dakota, where it was made, is not good in Minnesota, being contrary to her laws. There are exceptions to the rule that an assignment, if valid where made, is valid anywhere. *In re Dalplay*, 43 N. W. Rep. 564 (Minn.).

CONSPIRACY—COMBINATION TO KEEP UP RATES OF FREIGHT—RIGHTS OF COMPETITORS.—The defendants were firms of ship-owners trading between China and Europe. With a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, they formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of this association a rebate of 5 per cent. on all freights paid by them. They also reduced rates much below a remunerative standard in order to drive outside ship-owners from the field. The plaintiffs, who were rival ship-owners, trading between China and Europe, were excluded by the defendants from all benefits of the association, and in consequence of such exclusion sustained damage. *Held* (by Bowen and Fry, L. JJ., Lord Esher, M. R., dissenting), affirming the judgment of Lord Coleridge, C. J., that the association being formed by the defendants with the view of keeping the trade in their own hands, and not through any personal motive or ill-will towards the plaintiffs, was not unlawful, and that no action for conspiracy was maintainable. *Mogul Steamship Co. v. McGregor, Gow, & Co.*, 23 Q. B. D. 598 (Eng.).

This case is interesting for the light which all the opinions throw upon the important question of the rights of trade combinations. Lord Esher, in his dis-

¹ Bulletin de Législation Comparée, 20ième année, no. 7, p. 73.

senting opinion, maintains that the defendants' agreement being in restraint of trade was illegal; that the entering into the agreement was therefore an indictable conspiracy; and that, furthermore, the act of the defendants in lowering their freights so far below the remunerative point was not an act of fair trade competition, and was therefore a wrongful act as against the plaintiffs. But the other Lords Justices took the opposite view, declaring that such agreements in restraints of trade were *prima facie* void only, and not illegal in the sense of being indictable offences; that entering into them, therefore, did not constitute a conspiracy; and that "competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities, . . . gives rise to no cause of action at common law." Or, as Fry, L. J., expresses it "mere competition, . . . carried on for the purpose of gain, and not out of actual malice, is not actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect."

CONSTITUTIONAL LAW—POLICE POWERS.—Act N. Y. 1888, c. 581, § 1, fixes the maximum charge for receiving, etc., grain by means of elevators, and for part of the work fixes "the actual cost" as the maximum charge. The act is restricted to cities of not less than a certain population. *Held*, that the business of elevating grain is of such public interest that this act is within the police power of the State, and does not deprive elevator-owners of property without due process of law. Gray and Peckham, JJ., dissenting. *People v. Budd*, 22 N. E. Rep. 670, (N. Y.).

CONTRACTS—CONFLICT OF LAWS.—A contract was made in Boston between a citizen of the United States and an English company, for the transportation of cattle from Boston to Liverpool. By the terms of the contract the company was to be exempt from liability for loss by the negligence of its servants. By the law of Massachusetts and the United States this stipulation was invalid; but by the law of England it was valid. *Held*, that although when a contract made in one country is to be performed wholly or partially in another, it will, as a general rule, be governed by the law of the place where it was made; yet, if it appears that the contracting parties had some other law in view, the court will enforce the contract according to that law. On the facts of this case the court held that the parties intended the contract to be governed by English law, and therefore the company was not liable. *In re Missouri Steamship Co.*, 42 Ch. D. 321.

The court refer to the case of the *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397. The facts of the two cases were almost identical, but the Supreme Court of the United States reached the opposite result. The court proceeded on the same general principle, but could see in the facts no sufficient reason for changing the ordinary rule that the law of the place where the contract is made is to govern.

CONTRACTS—PUBLIC POLICY—ILLEGALITY.—A combination to raise the price of an article of prime necessity, *e. g.*, wheat, is illegal at common law; and money advanced in prosecuting such illegal purpose cannot be recovered. *Samuel et al. v. Oliver et al.*, 22 N. E. Rep. 499 (Ill.).

CRIMINAL LAW—JURISDICTION—"SPLITTING OFFENCES."—A court not having jurisdiction of an assault with intent to kill, cannot carve out of such major offence one of a lesser grade, such as an aggravated assault, and try that, for the reason that the conviction for such lesser offence is no protection in a subsequent trial for the higher offence. *Ex parte Brown*, 40 Fed. Rep. 81 (Ark.).

EQUITY JURISDICTION—NUISANCE—INJUNCTION.—An injunction granted to restrain defendant from maintaining a nuisance, by keeping a place for the unlawful sale of intoxicating liquors, though not enforced, is a bar to a second action by another plaintiff seeking the same relief, where the record makes no showing why the first decree is not enforced. Granger and Beck, JJ., dissenting. *Dickenson v. Eichorn*, 43 N. W. Rep. 620 (Ia.).

EQUITY JURISDICTION—REFORMATION OF CONTRACTS—FRAUD.—The plaintiff claimed that, on account of a fraudulent misrepresentation by the agent of the defendant, a lot covered by an agreement for the sale of land was not included when the contract was reduced to writing. *Held*, that the point was immaterial for an executory contract for the sale of land will not be reformed so as to make it include a larger quantity than is stated in the writing. *Davis v. Ely*, 10 S. E. Rep. 148 (N. C.).

EVIDENCE—ADVERSE WITNESS—RIGHT TO CROSS EXAMINATION.—A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the judge. Whether the witness is a litigant or not it is a matter of discretion with the judge whether he shows himself so hostile as to justify his cross-examination by the party calling him. *Price v. Manning*, 42 Ch. D. 372 (Eng.).

The Court of Appeal here disapproves the dictum of Best, C. J., in *Clarke v. Saffery*, Ry. & M. 126, which is cited in 1 Greenleaf, Evidence, 484, as authority for the proposition that in such a case the witness may be cross-examined as a matter of right.

INSURANCE—TRANSFERS OF INSURED PROPERTY.—An insurance policy for the benefit of husband and wife jointly on property of the husband provided that any change in the title, unless with consent of the company at the home office, should violate the policy. *Held*, a transfer from the husband to his wife through a third person vitiated the policy. Evidence was not admissible that when the policy was issued the agent who solicited it was told of the proposed transfer, and orally agreed thereto. Bradley, Haight, and Brown, JJ., dissenting. *Walton et ux. v. Agricultural Ins. Co.*, 22 N. E. Rep. 443 (N. Y.).

PARTNERSHIP—SALE OF REALTY BY SURVIVING PARTNER.—Where the personal property of a firm is insufficient to pay its debts, a surviving partner may sell partnership real estate to pay them, and if he conveys in good faith, and for a valuable consideration, though without an order of court, he passes an equitable title; and the widow of the deceased partner, having received the proceeds of the sale left after paying firm debts, is estopped from claiming any interest in the realty, as against the purchasers and their vendees. *Walling et al. v. Burgess et al.*, 22 N. E. Rep. 419 (Ind.).

PATENTS—INJUNCTION TO PROTECT INVENTION USED ONLY FOR GAMBLING PURPOSES.—No injunction will be granted on a bill charging infringement of a patent if it appears that the only use to which the invention has been put is to gambling purposes. Such an invention is not a useful invention within the meaning of the patent laws of the United States, and it is no ground for an injunction that the invention may subserve some useful purpose. *National Automatic Device Co. v. Lloyd et al.*, 40 Fed. Rep. 89 (Ill.).

QUASI CONTRACT—DUTY IMPOSED BY STATUTE—STATUTE OF LIMITATIONS.—An action arising out of defendant's failure to perform a certain duty, in consequence of which plaintiff was compelled to perform it, is based on an implied assumpsit to which the statute of limitations, concerning actions on simple contracts, is applicable, and is not based on the statute, though the duty which the defendant failed to perform was statutory. *Metropolitan R. Co. v. District of Columbia*, 10 Sup. Ct. Rep. 19.

REAL PROPERTY—CONVEYANCES IN FRAUD OF CREDITORS—The complainant seeks to set aside a voluntary conveyance made by his debtor to the defendant. Some of the debts were contracted before the conveyance some afterwards. No actual intention to defraud was shown. *Held*, that the conveyance was fraudulent as against prior creditors, but good as regards subsequent debts; that it could be set aside for the purpose of paying prior debts; but that subsequent debts could not be paid out of the land. *Gardner v. Kleinke*, 18 Atl. Rep. 457 (N. J.).

It is the rule almost universally that if a conveyance is set aside at the instance of prior creditors, subsequent creditors may participate in the fund, although the conveyance was valid as regards them. Bump, *Fraudulent Conveyances* (3d ed.), p. 324, and cases cited; Kerr, *Fraud and Mistake* (2d ed.), 181. *Ede v. Knowles*, 2 Y. & C. C. C 172. This rule must be supported on the ground of authority. On principle, the doctrine laid down in the principal case seems correct. *Williams v. Banks*, 11 Md. 198, *accord*.

REAL PROPERTY—COVENANT AGAINST INCUMBRANCES—MEASURE OF DAMAGES.—Only nominal damages can be recovered on a breach of a covenant against incumbrances, unless it appears that the plaintiff has extinguished the incumbrance. *Lane v. Richardson et al.*, 10 S. E. Rep. 189 (N. C.).

REAL PROPERTY—PERPETUITIES—ESTATE TO UNBORN CHILD OF UNBORN CHILD.—Under a power in a marriage settlement the estate was appointed to a child of the marriage for life, remainder in default of appointment to her to her children living at the date of the indenture of appointment. *Held*, that the re-

mainder was void. The rule applicable to legal limitations, that an estate cannot be limited to an unborn person for life, followed by an estate to any child of such unborn person, is an absolute rule independent of the rule against perpetuities. *Whitby v. Mitchell*, 42 Ch. D. 494 (Eng.).

Kay, J., adopts with approval the views of Mr. Joshua Williams on this much-disputed point. See Williams, *Real Property* (16th ed.), 314, 315. This seems to be the first decision in support of that view, and its correctness may, perhaps, be questioned. For a full discussion of the question, and statement of the reasons for the view that the Rule against Perpetuities is the only rule applicable to such a case, see Gray, *Perpetuities*, §§ 287-298.

SALE — DELIVERY — PAYMENT. — The vendor undertook to deliver iron of specific quality on board steamers at Liverpool, to be sent to the vendee at New York. There was no express contract in regard to inspection, but payment was to be made on receipt of the shipping documents. *Held*, the carrier is not the vendee's agent to accept the iron, but the right of inspection continues until the iron arrives in New York. Payment upon receipt of the shipping documents, but before inspecting and paying duties, does not prevent the vendee from denying acceptance, and he can recover the money thus paid. *Pierson et al. v. Crooks et al.*, 22 N. E. Rep. 349 (N. Y.).

SALE — DELIVERY — TENANCY IN COMMON OF HOMOGENEOUS ARTICLES. — Defendants, making application to the plaintiffs for the purchase of nuts, were informed that they were sold in bulk, by hectolitres, the purchaser to furnish bags on arrival of shipment. The defendants ordered 400 hectolitres. The delivery order was for 400 hectolitres of Brazil nuts in bulk, in separate hold. On presentation of the delivery order, it appeared that the 400 hectolitres destined for the defendants were included in a consignment, to several parties, of 582 hectolitres, which was the usual mode of shipping, though no custom, technically speaking, was proved. The defendants refused to separate or accept any of the nuts. *Held*, in an action for the contract price, that, in view of the fact that it was usual so to ship nuts, the delivery on board ship vested in the defendants title to 400-582 of the entire consignment, and that a tender of the total amount on arrival, for the defendants to separate their share, was a sufficient delivery. *Brownfield et al. v. Johnson et al.*, 18 Atl. Rep. 542 (Penn.).

This decision is on the authority of the grain-elevator cases, so called, where it is held that one who stores grain in an elevator becomes tenant in common *pro rata* with other depositors. It follows that when one depositor sells the whole or part of his grain, the vendee becomes the legal owner without separation of his part from the whole mass. This change in the common law arose from the modern methods of storage, and the general belief among merchants that they owned the grain so stored. The same reasoning applies to the principal case. The vendor undoubtedly believed that the nuts ceased to be his property on shipment, and there was a general usage of shipping different consignments in bulk to which the defendant must be taken to have assented. To give effect to this intention and usage, the doctrine of ownership in common has been adopted. For a discussion of this question see 6 Am. Law Rev. 450. Benjamin on Sales (Bennett's ed.), pp. 5 and 293.

SPECIFIC PERFORMANCE — ORAL LEASE — NOTICE TO SUBSEQUENT LESSEE. — Where tenants under a written lease make an oral agreement for a five years' lease, to begin at the end of the present term, and retain possession after the determination of the written lease, and make valuable permanent improvements on the faith of the agreement, this is sufficient part performance to take the agreement out of the statute of frauds, and warrant a decree for specific performance. This possession is sufficient notice of the tenants' rights as against one who has received a written lease of the premises, but who has paid no rent and expended no money under it. *Morrison et al. v. Herrie et al.*, 22 N. E. Rep. 537 (Ill.).

TORT — STATUTORY ACTION FOR DEATH OF HUMAN BEING — MEASURE OF DAMAGES. — In a statutory action for pecuniary injury resulting from death by the defendants's negligence, a right of support by the deceased is not essential to the plaintiff's recovery. The measure of damages in an action by collateral kindred is the probable future increase of the property of the deceased, and when up to the time of his death in middle life he had accumulated no property, damages should be merely nominal. *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195 (Vt.).

HARVARD LAW REVIEW.

VOL. III.

FEBRUARY 15, 1890.

No. 7.

JUDICIAL NOTICE AND THE LAW OF EVIDENCE.

IN considering the subject of judicial notice one has to beware of a common misconception. Very often it is supposed that there is but one question where in reality there are two, viz.: (a) the question whether the tribunal can assume a certain fact without proof, and (b) the question what it can do with it when it is assumed. Just as in applying the law of evidence,¹ there is no propriety in giving evidence of that which would not be available if it were in, and so in common legal language much is said not to be admissible which would be admitted if it had any bearing upon the case, so, in regard to judicial notice, there is much which in any given case would readily be noticed without proof if it could be applied to the purpose desired, but which is refused notice for the reason that the fact would be of no legal significance if it were recognized. Judges, in presiding over litigation, are not engaged in a philosophical investigation or an academic exercise; with them the search for truth is but an incidental matter and not the main one, and their ability to use a fact when it is proved or admitted or assumed is limited by the requirements of their main business, which is that of awarding justice,—awarding it according to the rules of law and under established usages and forms. That familiar instrument of justice, the doctrine of estoppel, often makes the actual truth of fact unimportant

¹ 3 Harv. Law Rev. 147.

in a particular case ; and in all cases the chief question for a judge is, not what is the actual truth of fact, but what is it lawful and just for him to take to be true for the purposes of the particular case then before him. Often, therefore, when a court is understood to declare that it cannot notice a fact without proof, what it really says is not this, but that it cannot hold a certain allegation in pleading to be sufficient, or a certain finding in a special verdict or an officer's return to be full enough, or a certain contract to be binding, or a certain piece of property to belong here or there.

After allowing for all this, however, there are yet many cases where the question is fairly presented of the power or the duty of a court to take cognizance of some matter without proof. The maxim that *manifesta* (or *notoria*) *non indigent probatione* may be traced far back in the civil and the canon law ; indeed, it is probably coeval with legal procedure itself. We find it as a maxim in our own books,¹ and it is applied in every part of our law. It is offset by another principle, also very old, and often overtopping the former in its importance, — *non refert quid notum sit judici, si notum non sit in forma judicii*.² These two maxims seem to intimate the whole doctrine of judicial notice,—a doctrine which has two aspects, one regarding the liberty which the judicial functionary has in taking things for granted, and the other the restraints that limit him.³

What is this doctrine of judicial notice, and whereabouts in the

¹ 7 Co. 39 a-39 b; 11 Co. 25.

² Coke, C. J., quotes this from Bracton, in an action of slander, *Crawford, v. Blisse*, 2 Bul. 150 (1613), to support the overstrained doctrine of that day about taking the words charged *in mihori sensu*.

³ The expression "to take notice of" anything, in our ordinary popular phraseology, imports observing or remarking it. In the legal language of to-day to "take notice" has a meaning correlative to that of giving notice; viz., that of a man's accepting or charging himself with a notification, or with the imputation of knowledge of a thing. But the import of the legal expression to "take judicial notice," as indicating the recognition without proof of something as existing or as being true, seems traceable rather to the older English usage. The word "notice" was formerly often used interchangeably with knowledge, and with our legal term "conscience." In the English of our Bible we read: "Wherefore have we afflicted our souls and thou takest no knowledge?" (Isa. lviii. 3.) "They took knowledge of them that they had been with Jesus." (Acts iv. 13.) So we find in the Norman French of our old reports the expressions "take notice" and "take conscience;" and when the reports begin to be translated and published in English, in the seventeenth century and later, we find the phrase becomes interchangeably take notice, take knowledge, and take conscience.

law does it belong? In trying to answer these questions, I propose first to deal briefly with the second one; then to present a number of cases which may furnish illustration, as well as a test and a basis of judgment as regards both questions; then to consider briefly the sort of thing of which courts will take notice without proof, distinguishing also the case of juries; and finally to mention a few discriminations which it is important to keep in mind if one would make an intelligent application of the doctrine.

I. Whereabout in the law does the doctrine of judicial notice belong? It does not belong peculiarly to the law of evidence. It does, indeed, find in the region of evidence a frequent and conspicuous application; but the habit of regarding this topic as a mere title in the law of evidence tends to obscure the true conception of both subjects. That habit is quite modern. The careful student will notice that a very great proportion of the cases involving judicial notice raise no question at all in the law of evidence; they relate to pleading, to the construction of the record or of other writings, the legal definition of words, the interpretation of conduct, the process of reasoning, the regulation of the order of trials. In short, the cases relate to the exercise of the function of judicature in all its scope and at every step. The nature of the process as well as the name of it find their best illustration in some of the older cases, long before questions in the law of evidence engaged attention. We are the less surprised, therefore, to find that it was not until Starkie printed his book on evidence, in 1824, that any especial mention of this subject occurs in legal treatises on evidence, and that Starkie has very little to say about it.¹ The subject of judicial notice, then, belongs where the general topic of legal or judicial reasoning belongs,—to that part of the law which defines among other things, the nature and limitations of the judicial function. It is, indeed, woven into the very texture of this function. In conducting a process of judicial

¹ Stark. Ev. i., 400-405. Bentham, to be sure, in his "Rationale of Judicial Evidence" (which was not a law book), composed in 1802-1812, and published partly by Dumont in 1823, and in full under the editorship of John Stuart Mill in 1827, had briefly discussed the question (Works, vi. 276, book i. c. 12,) how far a judge can pass on questions of fact without "evidence." He concludes, *inter alia*, that a judge should be allowed "at the instance of either party to pronounce, and, in the formation of the ground of the decision, assume, any alleged matter of fact as notorious," subject to the right of the other party to deny the notoriety and call for proof.

reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.¹

II. Let me now illustrate the subject by a number of classified cases drawn from all periods of our law.

1. Certain cases relating to pleading and other matter of record. In looking at these the reader will find constant illustration of what has already been indicated, that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, of stating them, and of conducting them. If formal words are necessary, like "felonice," and "murdravit," and "burglariter," in the old private appeals and in indictments, you must use them. If a certain form of action is necessary, you must resort to it. If a certain order or time of presentation be necessary, you must conform to it. If, as regards the fulness of detail or the precision of allegation, there be any rule of "certainty," you must conform to that. If there be any rule of the substantive law as to what con-

¹ Stephen (Dig. Ev., 1st and 2d ed., Ch. VII.) originally dealt with judicial notice under the general head of "Proof" and the special head of "Facts which need not be Proved." For this he was taken to task by an acute critic (20 Sol. Journal, 937), who suggested that since Stephen's art. 93, relating to the burden of proof, declares that whoever desires a judgment as to any legal right depending on the existence or non-existence of facts which he asserts, "must prove that those facts do or do not exist;" and since art. 59 (about judicial notice) declares that some facts asserted by a party need not be proved by him,—the true place for this last was that of an exception to the art. 93. This led Stephen, in his third edition, to change the special head of Ch. VII. from "Facts which need not be Proved" to "Facts Proved Otherwise than by Evidence" (his definition of "evidence," art. 1, being (a) the statements of witnesses in court, and (b) documents produced in court), and called forth certain remarks in the preface to the third edition (Little & Brown's ed. (1877) 26): "By proof I mean the means used of making the court aware of the existence of a given fact; and surely the simplest possible way of doing so is to remind the court that it knows it already. It is like proving that it is raining by telling the judge to look out of the window. It has been said that judicial notice should come under the head of burden of proof; but surely this is not so. The rules as to burden of proof show which side ought to call upon the court to take judicial notice of a particular fact; but the act of taking judicial notice, of consciously recalling to the mind a fact known, but not for the moment adverted to, is an act of precisely the same kind as listening to the evidence of a witness or reading a document: that is, it belongs to the general head of proof." As regards all this, one or two things may be briefly remarked: (a) "The general head of proof," and "the means used of making the court aware of the existence of a given fact," include the whole topic of legal reasoning: they spread far beyond the law of evidence. The same reach belongs to the burden of proof. So that both Stephen and his critic recognize the wide scope of judicial notice. (b) It seems a very inadequate conception of the subject of

stitutes the actionable or punishable thing, or what is a defence, of course the pleadings and the record must come up to these requirements. Under this head may be put the following cases: (a) In 1332-3,¹ in a *quare impedit* against the Dean and Chapter of St. Peter's at York, the Dean made no appearance. Counsel stated that he was dead, and then: "Trewe.² Where notice comes that a man is dead you are not to go to judgment against him. It is a notorious thing that the Dean is dead, and, therefore, you should not go to judgment against him. Herle (C. J. C. P.). We cannot go to judgment upon a thing notorious, but only according to what the process before us is. Basset. A *quare impedit*, was brought against H. de Stanton,³ and he died pending the writ, wherefore the writ abated. Herle. The writ was not abated by judgment, but the plaintiff waived his writ because he

judicial notice to speak of it as "a means of making the court aware" of a fact; it has to do not merely with the action of the court when the parties are seeking to move it, but when alone and acting upon its own motion. To read a document in court, or to listen to a witness there, is to deal with evidence." And so when an object is submitted to the judge's inspection in court. But the true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or at any rate is so accessible that there is no occasion to use "any means to make the court aware" of it; something which it may deal with quite unhampered by any rules of law. (c) There is sometimes confusion between judicial notice and inspection, or the dealing by a court with what Bentham calls "real evidence,"—a thing submitted directly to the senses of the tribunal; as in *Stephenson v. The State*, 28 Ind. 272 (1867), where the trial judge had decided the question whether the appellant was over fourteen years of age by simply inspecting him. He certified to the upper court that "as the defendant, being present in court, presented . . . the appearance of a full-grown man, such proof [*i.e.*, other evidence] was not required." Of course this was merely an instance of settling a question by the use of a certain sort of evidence,—and it may be added that it was, at common law, a very familiar way. But the upper court describe the situation as one where "no proof whatever was offered as to the age of the defendant." "The judge was not a witness, and the State is not entitled to avail itself of his knowledge, except upon matters of which the court takes judicial notice." The real ground of the court's decision here (granting a new trial) appeared to be that when a jury or trial judge decides a question of fact in this way, a party loses the benefit of his exceptions, because there is no way of presenting the evidence to an appellate court in such a manner as to enable it to judge of "the reasonableness of the impression" made upon the mind of the lower tribunal. We may agree that this case was rightly decided, without assenting to the court's conception of what took place at the trial, or their view that it is impossible to have the full benefit of exceptions when the trial court avails itself of "real evidence." Stephen's illustration of "proving that it is raining by telling the judge to look out of the window," is another instance of the use of real evidence.

¹ Y. B. 7 Ed. III. 4, 7.

² *Semble*, Simon de Trewethosa, a sergeant of the period.

³ Herle's predecessor as Chief Justice of the Common Pleas.

knew that he was dead." (b) In 1456,¹ in a *quare impedit*, the declaration related to a church in Wales, and the writ was brought in the County of Hereford. Littleton, for the defendant, objected that the plaintiff had not stated, either in his account or his writ, that Hereford adjoined Wales, and the law required that the action should be brought in a county adjoining. But the court held with the plaintiff, who insisted that "*prima facie* it will be intended that the County of Hereford adjoins Wales until the contrary is alleged; if the defendant would take advantage of this, he should allege that the County of Hereford is not adjoining, or otherwise it will be taken that it is." (c) In 1552-3², in an action of debt upon a statute the defendant demurred to the declaration for misreciting the statute as being of the 32 H. VIII., while in truth it was of the 33 H. VIII. Saunders, for the plaintiff, argued: "You Judges have a private knowledge and a judicial knowledge (un pryuate scyence et un iudyciall scyence), and of your private knowledge you cannot judge. . . . [And then he recites the story of Gascoigne and Henry IV., in Y. B. 7 H. IV. 41 (*infra*, p. 296), adding:] But there he could not acquit him and give Judgment of his own private knowledge. But where you have a judicial knowledge, there you may, and you may give judgment according to it. As if one be arraigned upon an Indictment for an offence which is pardoned by Parliament, there you ought not to proceed in it nor give judgment if he is found guilty, because it appears to you by your judicial knowledge that you ought not to arraign him. For the Judges ought to take Notice (prender conusance) of Statutes which appear to them judicially, although they are not pleaded; and then the misrecital of that whereof the Judges ought to take Notice without Recital is not material." But the court held that while the plaintiff need not recite the statute "because it is a general statute, and extends to every one of the King's subjects, and the Justices are bound to take notice of it, . . . [yet] the court should abate for the Misrecital. . . . For Declarations ought to have two things; the first is certainty, in order that the defendant may know what he is to answer to; . . . the other thing . . . is truth. . . . In our case he

¹ Y. B. 35 H. VI. 30, 35.

² Partridge v. Strange, Plow. 77, 83-84. I quote some of the original phrases in this case. It will be remembered that Plowden was published in French in 1571, and that the first translation appeared in 1761.

has grounded his Action upon a Statute by him recited, where it appears to us judicially that there is no such Statute made at that Time." Here the court was called upon to take judicial cognizance of the date of a statute, and they did it ; but they were restrained from giving the plaintiff the benefit of their knowledge by a rule of pleading.

(d) In 1588-9,¹ in an action of ejectment, there was a special verdict which set forth the founding of a hospital by the name of the Master and Chaplains of the Hospital of Henry the Seventh late King of England of the Savoy, and that afterwards the said master and chaplains being seized, etc., leased the same to the defendant by the name of W. H. Master of the Hospital . . . called the Savoy. And afterwards by their true name they leased the same to Thomas Fanshawe the plaintiff's lessor, and the question was whether the lease to the defendant by the name above stated was good.² The ground upon which the judges went who decided the case in the Exchequer of Pleas, and also those who agreed with them in the Exchequer Chamber, seems to have been that a very high degree of "certainty" was required in such a case.³ The case is here cited mainly for the high-strung reasoning of Coke in arguing for the plaintiff, in the Exchequer Chamber, against the lease : " If the Name given to this Hospital upon the foundation of it and the Name usurped in the lease be not unum in sensu (not in your private understanding as private persons, but in your judicial knowledge upon the Record, quod coram vobis residet as Judges of Record) then this lease is void. For although you as private persons, otherwise than by Record know that the Hospital of Savoy and the Hospital vocat. le Savoy are all one Hospital, you ought not upon that your private knowledge to give judgment, unless your judicial knowledge agree with it ; that is, the knowledge which is out of the Records which you have before you. But if the name given upon the Foundation and the usurped Name be

¹ *Marriot v. Pascall*, 1 Leon. 159; s. c. *sub nom. Mariot v. Mascal*, 1 And. 202, and *sub nom. Fanshawe's Case*, Moore, 228.

² This case was hard fought; in the Exchequer of Pleas it was held (Manwood, C. B., dissenting in a long opinion, preserved in Moore's Reports) that the lease was bad. In the Exchequer Chamber the court discussed it without giving judgment, and were divided in opinion; the full opinion of Anderson (C. J. C. P.) is found in his reports. But the case was finally settled by the parties.

³ See the quaint, pedantic discourse of Anderson, C. J., on words and names, in his long opinion in 1 And. 208-220.

not *idem sensu* in your judicial knowledge, and you cannot otherwise conceive the identity of these two Hospitals nor make any construction to imagine it but by the Record, for the Record is your eye of Justice, and you have no other eye to look unto the cause depending before you but the Record, and to this purpose he cited the case of 7 H. 4, 108, [*sic*, but meaning probably 7 H. 4, 41, which is thereupon inaccurately stated] . . . so in our case, it may be that you in your private knowledge know that the Hospital de la Savoy and the Hospital vocat. le Savoy is all one; but that doth not appear unto you upon the Record which is before you, but it may be for anything that appears in the Record, that they are diverse and several Hospitals. Therefore the lease is void."¹

(e) In 1611² an indictment alleged an arrest at London on 18 November "between the hours of five and six in the afternoon." It was contended that the arrest was illegal as being in the night, *i.e.*, after sunset; but the court ("all the Judges of England and Barons of the Exchequer") "resolved that although in truth between five and six o'clock in November is part of the night, yet the Court is not bound *ex officio* to take conusance of it, no more than in the case of burglary without these words, in nocte . . . or noctanter."³

(f) To these may be added a class of cases where the courts, for the purposes of a particular kind of action, refused to give effect

¹ To all this learned triviality add that of Manwood, C. B., in supporting the case of the defendant against another objection, *viz.*, that the lease was bad as omitting the word *late* (*nuper*), in the designation of King Henry VII. It is intended, he says, that he who speaks of King Henry VII. speaks of the late king of that name, "Just as the Dean and Chapter of Carlisle was incorporated by the name of the Dean and Chapter of the Holy and undivided Trinity, of Carlisle; and in the lease they omit undivided, yet was it good enough . . . and the reason was because by the name of the Trinity the word undivided is as strongly intended as if it were expressed; for everybody knows that the Trinity is undivided, and so in 36 H. 6 the foundation was the Church of St. Peter and Paul the Apostles, and the lease omitted the Apostles, and yet good, for it is intended in the plea, and all know that Peter and Paul were Apostles. So also the lease is good where the foundation is of the blessed Virgin Mary and Virgin is omitted; yet it is good, for all men well know that Mary was blessed and a Virgin."

² Mackalley's Case, 9 Co. 65 a, 67; *ib.* 62.

³ The phrases here are probably those of the first English edition of these reports in 1658, long after Coke's death in 1633. He published his reports in Norman French. The ninth book appeared in 1613, and the passage above quoted (not to quote it all) reads in the French: "Le court nest tenu ex officio a prender conusance de ceo nient plus que in case de burglary sans ceux paroles in nocte eiusdem diei, or noctanter." In Trotman's "Epitome" of the first eleven books, published in 1640, this reads (p. 468), "Court nest ten p prend notice," etc.

to the ordinary meaning of words, and persisted for many years in considering only whether they were susceptible of some other meaning. Actions for defamation, a slip transplanted from the popular and ecclesiastical courts, started into such a savage luxuriance of growth in the king's courts, in the sixteenth and seventeenth centuries, that the judges appear to have been frightened at it.¹ At any rate, for many years they did their best to discourage the action by applying a rule that the words should be taken *in mitiori sensu*. For example, it was held that it was not actionable as imputing crime to say of another,² "Thou hast stolen by the highway side," for it might be taken that he came unawares upon some one by the highway, or that he stole a stick under a hedge; or to say,³ "Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on the one shoulder and another part on the other," for "the party may yet be living, and it is then but trespass;" and again, in 1615-16,⁴ where one was charged with saying of another, "Thou art a Thief, for thou hast stolen me (Defendant innuendo) a hundred of slatte," it was held not actionable. The plaintiff's counsel in vain urged that this form of expression was "le usuall phrase del paies;" Coke, C. J., answered that he should have averred it, "otherwise we cannot take notice of it, for I do not know that it is a usual phrase in the country. It seems to me that the words are insensible, for it is clear that the first words are not actionable, scil., 'thou hast stolen me,' for it is not felony to steal a man, although it is to steal some women." At Easter, in 1616, plaintiff's counsel again brought up the case and said "ceo est un usuall phrase, come en le Scripture, Fetch me a kidd from the Flock."⁵ Doderidge, J.: "That is *for* me, and not

¹ See Professor Maitland's admirable little paper on "Slander in the Middle Ages," in *The Green Bag*, ii. 4 (January, 1890). In 1671, even, we find Vaughan, C. J., saying, in *King v. Lake* (2 Ventris, 28), in an action of slander: "The Growth of these Actions will spoil all communications; a Man shall not say such an Inn or such Wine is not good. Their Progress extends to all Professions. . . . The Words spoken here have no more Relation to the Plaintiff's Profession, than to say of a Lawyer he hath a Red Nose, or but a little Head." Vaughan was dissenting.

² *Brough v. Dennison*, Goldsborough, 143, 58 (1601).

³ *Holt v. Astgrigg*, Cro. Jac. 184 (1607).

⁴ *White v. Brough*, 1 Rolle, 286.

⁵ Shakespeare had just died, almost on the first day of this very Easter term. Would Coke, we may wonder, have recognized Prince Henry's description of Hotspur, "He that kills me some six or seven dozen of Scots at a breakfast," or the many other like phrases that are now so familiar to us,— "Rob me the exchequer," "He smiled me in the face," "How this river comes me cranking in," and the like?

from me." The counsel urged that either way was good enough for him. Doderidge: "It is uncertain how it should be taken, and therefore the action lies not, for the discredit of such actions; and judgment was given accordingly against the plaintiff."

(g) And again, under this head belong such cases as that of *Taylor v. Barclay*,¹ where, on a demurrer to a bill in equity which alleged that the British Government had recognized the independence of the Federal Republic of South America, the Vice-Chancellor, having informed himself at the foreign office that this was not true, took judicial notice of the fact, and declined to hold that what was thus known to the court to be a false allegation had been admitted by the demurrer to be true.

2. A second class of cases relates merely to the construction of writings or the interpretation of words. Here the courts take notice of the ordinary meaning of words, and, as some of the cases of slander already cited may indicate, they formerly took judicial notice, not merely, as now, of the general meaning, but also of the local use of language.² (a) In 1536,³ in holding good the condition of a bond to pay seven pounds to the obligor's own wife, Fitzherbert, J., says: "The meaning and intent of the parties shall be taken; for I have seen this case adjudged. Two made a contract for eighteen barrels of ale, . . . and the buyer would have had the barrels when the ale was gone; adjudged that he should not, because it is commonly used that the seller should have them, and it was not the intent of the parties that the buyer should have the barrels but only the ale. Suppose I make a covenant with you that if you come to my house I will give you a cup of wine; if you come you shall not have the cup, for it cannot be intended (entend) that my intent was to give you the cup." (b) In 1611,⁴ on the defendant's demurrer, in an action of debt on a bond, — in passing upon the meaning of these words in the condition, — "which should be levied," Fleming, C. J., laid it down that, "as touching construction of words they shall be taken according to the . . . intent of parties, . . . and this intention and construction of words shall be taken according to the vulgar and usual sense, phrase, and manner of speech of these words and of

¹ 2 Sim. 213 (18 8)

² See *McGregor v. Gregory*, 11 M. & W. p. 295.

³ Y. B. 27 H. VIII., 27, 12.

⁴ *Hewet v. Painter*, 1 Bul. 174.

that place where the words are spoken." In this case there was no averment that the words had any peculiar local meaning; the argument of counsel was in the terms adopted by the court and just quoted, and he illustrated thus: "As in Lincolnshire where eight strikes make a bushel, the judges of the common law are for to take notice of particular usages in several places, as of London measure in buying of cloth there." (c) And so in 1613 and 1623,¹ in actions on the case (1) for not delivering "20 Cumbos tritici," "though it is not avowed by any Anglice quid est Cumbos, yet the court ought to take notice thereof, being the Phrase of the Country of Norfolk and Suffolk and other Places, and there well known;" (2) upon a sale of "quosdam Carrucas signatas, Anglice Car-rooms, though it is not averred what is intended by the Word Car-rooms, nor what it signifies, yet the Declaration is good; for it is a Phrase in London well known, of which the Court ought to take notice, this being a Phrase of the country."² (d) In the case of *Hoare v. Silverlock*,³ where, in an action for libel, in saying of the plaintiff in a newspaper that certain persons dealing with her "had realized the fable of the Frozen Snake," after a verdict for the plaintiff the court declined to arrest the judgment. Lord Denman remarked: "We are not called upon here to take judicial notice that the term 'Frozen Snake' had or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not a jury were certainly wrong in assuming that those words had the particular meaning."⁴

It would be idle to add to this class of cases. Nothing is more familiar than the spectacle of courts construing wills, deeds, contracts, or statutes upon their own knowledge of the import of words.⁵

3. The last class of cases which I shall name relates to various miscellaneous duties of the court. (a) In 1302⁶ (among cases tried

¹ Rolle's Ab. Court C. 6, 7.

² "By Car-rooms," adds Rolle, "is intended a Mark which the Lord Mayor puts upon a Cart."

³ 12 Q. B. 624 (1848).

⁴ Of the same character is the case of *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, where the question was presented in a similar way, but the judgment was arrested.

⁵ *Nelson v. Cushing*, 2 Cush. 519, 533; *Atty.-Gen. v. Dublin*, 38 N. H. 459, 513; *Meyer v. Arthur*, 91 U. S. 570; *Tindal, C. J., in Shore v. Wilson*, 9 Cl. & F. p. 569; *Bowes v. Shand*, 2 App. Cas. 455; *Towgood v. Pirie*, 35 W. R. 729; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 343.

⁶ Y. B. 30 and 31 Ed. I. 256.

at the Cornish Iter), in an assize of novel disseisin brought by John de Botton against John de Wilton and others, a plea in abatement for misnomer was put forward, and was promptly allowed. "Westcot. Sir John answers and says that his name is John de Willington; judgment of the writ, . . . Hunt. known by this name; ready, etc. Brompton, J. He is known through all England as Willington and by no other name, and that well know we; and therefore as to John you shall take nothing by your writ." This was giving judgment upon a point of ordinary fact as being notorious. (b) In 1406,¹ in a discussion over arresting judgment on the ground that the facts appeared of record to be otherwise than as the jury had found, Gascoigne (C. J. K. B.) said: "Certainly if I had been sworn on the same inquest I should, upon the evidence shown on the King's part, have found for him (*i. e.*, against the actual verdict). Tirwhit. Sir, suppose a man killed another in your presence and actual sight, and another who is not guilty is indicted before you and found guilty. You ought to respite the judgment against him, for you know the contrary, and to inform the King, that he may pardon (*faire grace*). No more in this case. . . . for you are apprised of the Record. . . . Gascoigne. Once the King himself questioned me as to this case which you put, and asked me what the law was; and I told him as you say. And he was well pleased that the law was so." (c) A well-known set of cases has to do with the calendar and certain sorts of facts ordinarily given in almanacs. When the books talk about "the calendar," they refer sometimes to the mere order and arrangement of days, and especially saints' days and ecclesiastical feasts, by which the terms and days of court were regulated; and sometimes to the books or written or printed tables in which this order was set down. The courts almost of necessity recognized without proof the established order and arrangement of days, and the phrase was that "the calendar was part of the law of England," and so of "the almanac." Moreover, in the multitude and multiplication of saints and saints' days, and the intricacies attending upon the notion of movable feasts, and the arrangement of the Council of Nice regulating Easter by the relation of the moon to a certain date in March, it was no easy matter to find out the details of the calendar for any given year; so that the courts were assisted by written and

¹ Y. B. 7 H. IV. 41, 5.

printed tables of more or less authority. In the Black Book of the Exchequer¹ there is preserved a calendar and a list of dominical letters, dating back, perhaps as far as 1187. This may well have been the official memorandum of the Exchequer. Since the courts found it convenient or necessary to rely upon such tables, the notion of taking judicial notice of the order of days was easily transferred to the table which set it forth. In 1493-4,² a question arose on a writ of error over the continuance of a case to the Monday before St. Boniface's day. There was only one St. Boniface in the "mertlage,"³ and apparently only one was generally recognized; but two were in the printed calendar. The court finally held the continuance good. I give a translation of this early case in a note. It is curious as showing a very early reference in our reports to a *printed* calendar, and as showing the perplexity that such questions might cause at that period.⁴

¹ Bond's Handy Book of Dates, 68.

² Y. B. 9 H. VII. 14, 1.

³ My friend Professor Child has helped me to the meaning of this word, which puzzled the Chief Justice in the case. It is what we call a "Lives of the Saints," a martyrology. See Ducange; "Martilagium et Martilegium;" also "Matrilogium;" "pro Martyrologium." The martyrs and confessors "are the chief names which appear in the list of Saints'-days and festivals of the Church." (Bond's Handy Book of Dates, 146.)

⁴ "A writ of error was brought, and error was assigned that: One brought an action of debt in a court which was granted by patent, and had a day of continuance till Monday next before St. Boniface's day; and the defendant pleaded, . . . and on Monday next the defendant appeared, and found against him; and it was assigned for error that St. Boniface's day was past before the day given as Monday next before St. Boniface. In fact, there were two St. Boniface's days in the printed calendar, and in the mertlage only one Boniface. It was moved whether this be error or not. Kingsmil. Although there are not two Bonifaces in every book, if there be two Bonifaces, the continuance is good. There are two in the calendar; and so the continuance is good and will be referred to the Boniface who is to come and not the one passed. There are divers saints who are not in the calendar, and yet a continuance to such and such a day of such and such a saint is good if any such saint there be. As St. Swithin here at Winchester is not in the calendar, yet a continuance to this day is good; . . . for if the day be known there it is enough, though it be not in the calendar. (Which the justices agreed to.) They say (diont) that there are a hundred saints who are not in the calendar; people, also, here in the South do not recognize them; and yet the continuance to one of the days is good. Just so there are two Bonifaces, and the printed calendar proves it. Wherefore, etc. Huston [argued] to the contrary, and [said] in the mertlage there is only one. Hussey [C. J. K. B.] What do you mean by this *mertlage*? What is it? Huston. It is a calendar universal in the church of this realm, which priests are bound to keep, and no other (nient plus); and although a new saint were canonized beyond sea, there is no reason why people are bound to recognize him; and so a continuance to such a saint's day is not good. So here, for in this realm there is only one Boniface, and whether there are [anywhere] two or not, I know not, but it seems not, for he is not in the mertlage. The

In 1704,¹ when a writ of inquiry was returnable *tres Trinitatis* and was returned executed June 14, which was on Monday, the day after the return day, the court held that they must judicially take notice that *tres Trinitatis* was on a Sunday, and equally although it was not assigned for error on the record. "Holt, C. J.: At the Council of Nice they made a calculation movable for Easter forever, and that is received here in England and becomes part of the law; and so is the calendar established by act of Parliament. And can we take notice of a feast without telling what day of the month it is? Shall we take notice of it because you show it on the record and not when we see it as plainly without your telling?" There are also cases where courts judicially notice any common almanacs as accurate sources of information about such facts as the time of the setting and rising of the sun and moon; or rather, as it is more accurately put, these courts notice without proof the facts themselves.² (d) In *Brown v. Piper*,³ on appeal in equity from a Circuit Court, where the plaintiff asked for an injunction to restrain the defendant from infringing a patent for preserving fish and other articles, the Supreme Court of the United States, having in this case the duty of passing upon facts as well as law, reversed a decree for the plaintiff on the ground that his invention lacked novelty. They adverted to a matter of fact which was nowhere mentioned in pleadings of proof. The patent was for preserving fish and other articles in a close chamber by a freezing mixture having no contact with the atmosphere of the preserving chamber. The Supreme Court called to mind something which

printed calendar is not to the purpose, and may be false; and maybe there are two Bonifaces beyond sea and only one in England. The judges sent to the Common Bench about the matter. Brian [C. J. C. B.] thought the continuance not good unless two Bonifaces were recognized in England and in the merrilage; or at least recognized, for the printed calendar is of no authority (ne dasc, auctorit.). Vavisor [Justice of the C. B.] to the contrary. And we were in doubt (fuimus in doubt). And those in the King's Bench held the continuance good." I have followed an edition of 1597; the Maynard edition appears to have various misprints.

¹ *Harvey v. Broad*, 6 Mod. 159, s. c. ib. 196. "The Almanack to go by is that which is annexed to the Common Prayer-Book." Holt, C. J., in *Brough v. Perkins*, 6 Mod. 81 (1703). And see *Tutton v. Darke*, 5 H. & N. 647; *Nixon v. Freeman*, ib. 652. Now-a-days, in referring to the almanac, courts have as little thought of any particular edition as they have when they refer to the Bible or to *Æsop's Fables*.

² *People v. Chee Kee*, 61 Cal. 404; *State v. Morris*, 47 Conn. 179; *Munshower v. The State*, 55 Md. 11; *aliter Collier v. Nokes*, 2 C. & K. 1012.

³ 91 U. S. 37.

is in all men's knowledge as being old, in daily use, and involving the same principle ; viz., the common ice-cream freezer. Of this and of the preservative effect of cold, they said we take judicial notice, and will deal with it as if set up in the answer and fully proved. "We think this patent was void on its face, and that the court might have stopped short at that instrument, and without looking beyond it into the answers and testimony, *sua sponte*, if the objections were not taken by counsel, well have adjudged in favor of the defendant."

(c) Recently, the Court of Appeals of New York¹ reversed a judgment for the plaintiff, in an action for personal injuries received while in the defendant's service as a brakeman in passing through a tunnel on the top of a freight car. The height of the tunnel was considerably lessened in the interior of it by an arch not visible at the entrance, and of this lessening the plaintiff must be assumed to have had no notice. The injuries appeared to have come from striking the plaintiff's head against the arch. But his own testimony was that he was sitting when the accident happened, and the distance between the top of the car and the bottom of the arch was four feet and seven inches. The trial judge had left it to the jury that, "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." After verdict and judgment the defendants appealed, and the Court of Appeals put the question thus : "Whether we will accept that finding . . . or whether we will take judicial notice of the height of the human body and the measurements of its separate parts, and . . . reverse a judgment that is based upon a finding clearly contrary to the laws of nature." In proceeding to grant a new trial, the court take judicial notice that the average height of man is less than six feet, and the average length of the human trunk to the top of the head is less than three feet, and that men differ in height mainly from a difference in the length of their legs ; that this plaintiff could not have struck his forehead against the arch while sitting, unless he were at least nine feet high, and that there is no authenticated instance in human history of any such height ; that while the plaintiff may have been a tall man and the jury may properly have acted upon their inspection of him, "a fact so rare in the

¹ Hunter v. N. Y. O. & W. Ry. Co., 23 No. East. Rep. 9 (Dec. 1889).

course of nature should be made apparent, in some way, on the record."¹

III. So far I have spoken of the court. As regards our modern jury, the same considerations apply to them; for now they also are judicial officers, bound to act only upon the evidence which is given to them under the eye of the judge. "A jury," says Mr. Justice Grier, speaking for the Supreme Court of the United States in 1850, "has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact of which there is no evidence from which it may be legally inferred."²

Formerly this was not so. For centuries the jury used freely their private knowledge; it was their duty to do so. They did, indeed, exercise a judicial function,³ but they were not restrained by the doctrine of judicial notice. The change in their character was a very gradual one. We may still read in the second edition, published in 1735, of the anonymous "Law of Evidence,"⁴ the doctrine about the jury which was stated in Bushell's case: "The law supposeth them to have knowledge of and capacity to try the Matter in Issue (and so they must), though no Evidence were given on either side in court; but to this the Judge is a Stranger; *i.e.*, he cannot Judge without Evidence, though the Jury may." But taking the jury as it stands to-day, it is a body which is bound to keep within the restrictions imposed upon courts by the principle of judicial notice; and also it has the same liberty which that principle allows to courts. No doubt, in the case of *Brown v. Piper*,⁵ above named, it was the right and the duty of the lower court,

¹ It will be observed that the substance of this decision is merely that the justice of the case required a new trial, and we may suppose that the court had sufficient reason for thinking that the points here elaborated had not been duly considered. But the opinion has an aspect of nicety. Might not the brakeman justly have been regarded by himself and by the jury as "sitting," although at a given moment he was shifting his position, and so raising himself momentarily a foot or two above his sitting height? The tunnel at its entrance was more than four feet higher than the arch, and allowed him a good margin.

² *Parks v. Ross*, 11 How. 362, 373; and see *Schmidt v. Ins. Co.*, 1 Gray, 529. This is a modern doctrine. A learned writer (*Pike's Hist. Crime*, ii. 368, 369) has even said that it is not found formally declared in our reports before 1816, by Lord Ellenborough in *R. v. Sutton*, 4 M. & S. 552.

³ See, *e.g.*, *Temple v. Cooke*, 3 Dyer, 265 b.

⁴ The earliest English treatise on this subject, originally published in 1717.

⁵ 91 U. S. 37.

acting as it did without a jury, to deal with the generally known fact about ice-cream freezers in the way it was used by the Supreme Court. Equally true is it that if the same question had in any way come before a jury they should have done the same. The circumstance that the jury is a subordinate tribunal does not change the nature of their office ; it merely subjects them in many of the details and particulars of their exercise of it to the direction of the judge. Accordingly we find it abundantly recognized in our law that juries are also within the range of the doctrine of judicial notice ; as in *Com. v. Peckham*,¹ where on an indictment for the sale of intoxicating liquor the court below refused the defendant's request for an instruction that evidence of a sale of gin was not enough, without further evidence that gin was intoxicating ; and this refusal was sustained on exceptions. "Jurors," said Mr. Justice Metcalf, " . . . are allowed to act upon matters within their general knowledge without any testimony on those matters."² On the other hand, the restraining operation of this doctrine was applied by the same court, a little later, to a question of the character of the witnesses.³ The plaintiff in his closing argument appealed to the personal knowledge of some of the jury, that the general character of certain witnesses was "so infamously bad" as to make them unworthy of belief ; but the trial judge instructed the jury that they could not act upon such knowledge unless it were testified in court ; and this ruling was sustained. In all cases where a jury has to estimate damages and to act upon expert testimony, their power is recognized of bringing into play that general fund of experience and knowledge which in theory of law is always imputed to them. This was formally held in 1881 by the Supreme Court of the United States, in a case⁴ where experts had testified to the value of a lawyer's professional services. And the court cited with approval a case in which Chief Justice Shaw,

¹ 2 Gray, 514.

² And he continued with that well-known flavor which gives character to his opinions : "Now everybody who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor without evidence that it was not a solid substance, as that they could not find that it was intoxicating without testimony to show it to be so. No jury can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

³ *Schmidt v. Ins. Co.*, 1 Gray, 529, 531, 535.

⁴ *Head v. Hargrave*, 105 U. S. 45.

speaking of the question of damages in trover, remarked: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. . . . The jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." The operation of the same principle in supplementing evidence came out neatly in *Bradford v. Cunard Co.*, 147 Mass. 55, where woollen goods of a certain value had been soaked or otherwise injured by salt-water and soda ash, and no admissible evidence was before the jury going to the precise amount of the damages; they fixed it at \$500; and the court allowed this to stand, on the ground that they could not say but that the jury might, "as a matter of common experience," find the damage to be not less than the amount named. In *R. v. Sutton*¹ the refined doctrine seems to be put forward that a jury may be referred to their own knowledge of facts which have been sufficiently proved otherwise, in confirmation of this evidence.

At the end of this collection of instances illustrating the application of the doctrine of judicial notice, I may be permitted to repeat what they help to illustrate, that this topic has its proper place, not in the law of evidence or of pleading, or in any other particular department in our ordinary classification of the law, but in that part of it which is concerned with stating the nature of the judicial function and the limitations under which it has to be discharged; that any consideration which this subject can properly receive in treating other titles must be merely incidental; and, in particular, that in considering the law of evidence, the question of what the judicial tribunal may or must take knowledge of without evidence or argument, is on the same footing as the question of what one needs or does not need to prove in order to sustain any particular action. That is, indeed, something very necessary for one to know who would apply the law of evidence; but he must learn it elsewhere.

IV. What are the things of which judicial tribunals may take notice, and should take notice, without proof? It is possible to indicate with exactness only a part of these matters. Some things are thus dealt with by virtue of express statutory law; some in a

¹ 4 M. & S. 532.

manner that is referable merely to precedent, — to the actual decisions, which have selected some things and omitted others in a way that is not always explicable upon any general principle ; others upon a general maxim of reason and good sense, the application of which must rest mainly with the discretion of the tribunal, and, in any general discussion, must rather be illustrated than precisely defined.

Courts, then, notice without proof: (1.) Things which are required by statute to be so noticed, as certain certificates, and attestations of the records and judicial proceedings of the States and Territories ;¹ and certain volumes or printed sheets, purporting to be authentic records of law, whether domestic or foreign ; and the like.² (2.) Whatever they have been accustomed to notice in this way, according to the established course of the common law and the practice of particular courts ; as the authenticity of the signature, seal, and certificate of a notary public, when his certificate purports to be given in the discharge of his ancient international function of protesting foreign bills of exchange.³ The recognition by courts of the international relations of their own country, of the great seal, of the names and official signatures and public acts of high public officials, past and present, and the like, may come under this head.⁴ The administration of justice is carried on by the sovereign. The sovereign, in the lapse of time, has lost something of his concreteness, if he have not become a mere political expression. But when the king, long ago, sat personally in court, and, in later times, when judicial officers were in a true and lively sense the representatives and even mere deputies of the king, it was an obvious and easily intelligible thing that courts should notice without evidence whatever the king himself knew or did in the exercise of any of his official functions, whether directly or through other high officers. The same usages of the courts have continued, under the prevalence of legal and political theories very different indeed from those just mentioned ; and it is not to be wished that these usages should change. Practical convenience and good sense demand an increase rather than a lessening of the number of the instances in

¹ Rev. St. U. S. s. 905; Pub. St. Mass. c. 169, s. 67.

² See 2 Tayl. Ev. s. 1527 for illustrations of this; *Brady v. Page*, 59 Cal. 52.

³ *Anonymous*, Holt, 296, 297; *Pierce v. Indseth*, 106, U. S. 546.

⁴ *Wells v. Jackson Co.*, 47 N. H. 235.

which courts shorten trials, by making *prima-facie* assumptions of matters not likely, on the one hand, to be successfully denied, and, on the other, admitting readily of verification one way or the other if they be denied.¹

It should be remarked, also, that some of the limitations upon the power of taking judicial notice of facts which are laid down in the books are only explicable upon the ground of precedent, and so are properly to be referred to this head of the established practice of the courts. It is said in English cases and in the text-books that the courts will notice the different counties, but not that any particular place is in a given county, or where it is.² Cases of this class often decide something quite different from the broad principle for which they are cited ; but in so far as any such doctrine as that last mentioned is true, it must rest merely on authority. The refusing to notice a well-known custom of London in *Argyle and Hunt*³ is to be regarded in the same light.

(3.) Courts notice without proof all that is necessarily or justly to be imputed to them, by way of general outfit for the proper discharge of the judicial function ; and, as Lord Mansfield said of the underwriters and certain usages which they were bound to know :⁴ " If they do not know them they must inform themselves." Such things are the ordinary usages and practice of their courts ; the general principles and rules of the law of their jurisdiction ;⁵ the ordinary meaning, construction, and use of the vernacular language ; the ordinary rules and methods of human thinking and reasoning ; the ordinary data of human experience and judicial experience in the particular region ; the ordinary habits of men.⁶

(4.) And then, finally, there is a wide principle, covering some

¹ In *Peltier's Case*, 28 State Trials, 616 (1803), Lord Ellenborough, in summing up to the jury, said : " That Napoleon Buonaparté was the chief magistrate and first consul of France is admitted. And that [France and England were at peace] is also admitted ; and, indeed, they were capable of easy proof if they had not been admitted. Their notoriety seems to render the actual proof very unnecessary."

² *Deybel's Case*, 4 B. & Ald. 243; *Brune v. Thompson*, 2 Q. B. 789. But see *infra* 310-312.

³ 1 Strange, 187.

⁴ *Noble v. Kennoway*, 2 Doug. 510.

⁵ In a great proportion of the cases that come before the United States courts they may and must take judicial notice of the laws of any State in the Union, as well as of the United States. *Hanley v. Donoghue*, 116 U. S. p. 6.

⁶ " And Holt, Chief Justice, said, That the Way and Manner of Trading is to be taken notice of." *Ford v. Hopkins*, 1 Salk. 283. In *Turley v. Thomas*, 8 C. & P. 203, at nisi prius, the judge took notice of the [English] rule of the road, to turn to the near hand, and ruled that it applied to riding as well as driving.

things already mentioned, that courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows. The application of such a principle must, as I have said, leave a great range of discretion to the courts; only in a large and general way can any one say in advance what are and what are not matters of common knowledge. Some such things as the following may be laid down: Whatever a court will notice without proof it may state to the jury, or allow to be stated to it, without proof. Just as it is safe, and even necessary, to assume that juries, witnesses, counsel, and parties, as well as the court itself, all understand the ordinary meaning of language, and have enough capacity, training, and experience to conduct ordinary business and to understand it when it is talked about, so and upon like grounds it is assumed that they all know certain conspicuous and generally known facts, and are capable of making certain obvious applications of their knowledge. A knowledge of certain great geographical facts will be assumed, as that Missouri is east of the Rocky Mountains,¹ and that "such streams as the Mississippi, the Ohio, and the Wabash for some distance above its confluence with the Ohio, are navigable,"² but the point where they cease to be navigable is on a different footing. In Massachusetts it is lately held that a court may judicially notice that the Connecticut river, above the Holyoke dam, is not a public highway for foreign or interstate commerce.³ Certain great facts in literature and in history will be noticed without proof; *e.g.*, what in a general way the Bible is, or Æsop's Fables, or who Columbus was; but as to particular details of the contents of these books or of Columbus's discoveries, it may well be otherwise. A knowledge will be assumed of the nature and effects of familiar articles of food or drink or ordinary use, and an infinite number of like matters. Illustrations of this abound in our books; some have already been given; let me add a few others. Where a tobacconist was indicted for illegally keeping his shop open on Sunday, and sought to bring himself within a statute which permitted "the retail sale of drugs and medicines," without any attempt to show that he sold tobacco as a medicine, or kept his shop open for the sale of it as such, this evidence was excluded, and the jury were charged that "keeping one's shop

¹ *Price v. Page*, 24 Mo. 65.

² *Neaderhouser v. The State*, 28 Ind. 257.

³ *Com. v. King*, 22 No. East. Rep. 905 (November, 1889).

open to sell cigars on the Lord's Day" would support a conviction. In holding this construction right, the court (Knowlton, J.) say:¹ "Some facts are so obvious and familiar that the law takes notice of them. . . . The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinion of witnesses who offer to testify that they are. . . . We are of the opinion that cigars sold by a tobacconist in the ordinary way are not drugs or medicines, within the meaning of those words as used in the statute." In passing on the constitutionality of a prohibitory liquor law,² Comstock, J., in the New York Court of Appeals, laid it down as a basis of reasoning that "we must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries. . . . It must follow that any . . . legislation which . . . makes the keeping or sale of them as a beverage . . . a criminal offence . . . must be deemed . . . to deprive the owner of the enjoyment of his property." On a like question in the Supreme Court of Indiana,³ one of the majority of the court declared: "The court knows as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, etc.,⁴ as a beverage is not necessarily hurtful, any more than the use of lemonade or ice-cream." The Court of Appeals in New York,⁵ in declaring unconstitutional an act prohibiting the manufacture of cigars and tobacco in tenement houses, said: "We must take judicial notice of the nature and qualities of tobacco. It has been in general use among civilized men for more than two

¹ *Com. v. Marzynski*, 149 Mass. 68; s. c. 21 No. East. Rep. 228 (1889).

² *Wynehamer v. The People*, 13 N. Y. 378, 387 (1855).

³ *Beebe v. The State*, 6 Ind. 501, 519 (1855), and so *Klare v. The State*, 43 Ind. 483, declining to recognize judicially that common brewers' beer is intoxicating.

⁴ This "etc." gives great possible enlargement to the doctrine. Coke's maudlin commentary upon Lyttleton's "&c" may be recalled. "Here is the first '&c' and there is no '&c' in all his three books . . . but it is for two purposes. First, it doth imply some other necessary matter. Secondly, the student may, together with that which our author hath said, inquire," etc., etc. And he goes on to catalogue a hundred and more of these pregnant symbols (Co. Lit. 17 a-17 b). As regards the "etc." in the text, the same court judicially knows that whiskey is intoxicating, and allows a jury to find it so upon their general knowledge (*Carmon v. The State*, 18 Ind. 450). The Supreme Court of Wisconsin (*Briffitt v. The State*, 58 Wis. 39) takes judicial notice that "beer," when the word is used alone, imports strong beer, and that such beer is intoxicating; *aliter* in the New York Court of Appeals, *Blatz v. Rohrbach*, 22 No. East. Rep. 1049 (Nov., 1889).

⁵ *Jacobs's Case*, 98, N. Y. 98, 113 (1885).

centuries. It is used in some form by a majority of the men in this State, by the good and bad, learned and unlearned, the rich and the poor. Its manufacture into cigars is permitted without any hindrance, except for revenue purposes, in all civilized lands. It has never been said . . . that its preparation and manufacture into cigars were dangerous to the public health. We . . . are not able to learn that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture."¹ So a court will notice, without pleading or proof, that a pile of lumber is likely to attract children to play about it;² that a freight car left in a highway is not likely to frighten horses of ordinary gentleness;³ that photography is a proper means of producing correct likenesses;⁴ what are the "nature, operation, and ordinary uses" of the telephone;⁵ what is the meaning, upon a parcel, of C. O. D.;⁶ that steamboats (first used in 1807) were in 1824 freely employed in transporting merchandise, and not merely passengers;⁷ that a post-card is likely to be read by others than the one to whom it is addressed;⁸ that coupon railroad tickets for a continuous journey over several different lines

¹ The judges sometimes cover a wide range in their reasonings, and take a very great deal for granted. See, e.g., the opinion of Chancellor Walworth on ale and beer, in *Nevin v. Ladue*, 3 Denio, 437; that of Chancellor Bland on trees and their mode of growth, in *Patterson v. M'Causland*, 3 Bland, 69; and that of Taney, C. J., on negroes, in *Dred Scott v. Sandford*, 19 How. 393.

² *Spengler v. Williams*, 6 Southern Rep. 613 (Miss. 1889).

³ *Gilbert v. R'y Co.*, 51 Mich. 488, a singular decision.

⁴ *Udderzook v. Com.*, 76 Pa. St. 340; *Dyson v. N. Y. & N. E. R'y Co.*, 17 Atl. Rep. 137 (Conn. 1888), "not hitherto passed upon by this court."

⁵ *Wolfe v. Mo. Pac. R'y Co.*, 11 So. W. Rep. 49 (Mo. 1889).

⁶ *State v. Intoxicating Liquors*, 73 Me. 278. "What is notorious needs no proof." *Peters. C. J.*

⁷ *Gibbons v. Ogden*, 9 Wheat. 1, 220. Such questions relating to new inventions and new usages, must often be answered one way at one time, and in a different way later on. In *ex parte Powell*, 1 Ch. Div. 501, we find the English Court of Appeal declining to recognize without proof the existence of a certain custom in 1875, while in 1881, in *Crawcour v. Salter*, 18 Ch. Div. 30, the same court holds it to be now so well known that the courts must judicially notice it. For centuries our courts have noticed without proof what the term "o'clock," imports; but when we read (Black Book of the Admiralty, I. 313, note) that "hours of the clock are mentioned [in certain records] in this reign (Richard II.) for the first time, on March 8, 1390" we are reminded that there was a time, in the long annals of these courts, when they would have refused to take judicial notice of this novelty.

⁸ *Robinson v. Jones*, 4 L. R. Ir. 391 (1879); and as to telegrams, *Williamson v. Freer*, L. R. 9 C. P. 393 (1874). Post-cards containing certain objectionable matter are declared non-mailable by a statute of the U. S. of Sept. 26, 1888 (25 St. U. S. 496).

were in general use long before March 17, 1885, the date of a certain patent;¹ what the nature of the business of a mercantile agency is;² and that "habitual drunkenness" as a ground for divorce, and being a "habitual drunkard" as a ground for punishment, do not include habitual or common excess in the use of morphine or chloroform.³

V. Some discriminations should now be mentioned which ought to be attended to in applying the doctrine of judicial notice.

(1.) Sometimes the ultimate fact that is sought to be proved is noticed, and sometimes the thing noticed is the trustworthiness of a certain medium of proof, and not the thing itself which this tends to prove, as when a notarial seal and signature are taken without proof, or the certificate of a registrar of deeds or other public official. That is to say, the question sometimes concerns an evidential fact and sometimes an ultimate one; whichever it be, it is governed by the same principles. When the statutes of the United States⁴ make Little & Brown's edition of the laws and treaties competent evidence of their contents "in all the tribunals and public offices of the United States and of the several States, without any further proof or authentication thereof," the courts are required to take notice of a certain medium of proof as being sufficient. Some of these contents — the public acts — are supposed to be known by the judges without calling for evidence of them; but even as regards these, their discretion in selecting and rejecting modes of proof is here restricted; they cannot reject these volumes. And when in an excellent case⁵ it was held that although in our courts English statutory law is matter of fact to be pleaded and proved, yet a court will recognize printed books of statutes and printed reports of adjudged cases shown to the satisfaction of the court to be correct — "books of acknowledged or ascertained authority" — as competent evidence of the foreign law, we perceive the doctrine that the court may take judicial notice of a certain means of proving a fact when it cannot take notice of the fact itself.⁶ The doctrine that almanacs may be referred to in order to ascertain

¹ *Eastman v. Chic. & N. W. R'y Co.*, 39 Fed. Rep. 552 (C. C. N. D. Ill. 1889).

² *Eaton Co. v. Avery*, 83 N. Y. p. 34.

³ *Youngs v. Youngs*, 22 No. East. Rep. 806 (Ill. 1889); *Com. v. Whitney*, 11 Cush. 477.

⁴ R. S. U. S. s. 908.

⁵ *The Pawashick*, 2 Lowell, 142.

⁶ And so in *Ennis v. Smith*, 14 How. 426-430.

upon what day of the week a given day of a month fell in any year, to learn the time of sunrise or sunset, and the like, and that, in order to prove facts of general history, approved books of history may be consulted, may also be regarded as illustrating the taking notice of the authenticity of evidential matters,—of certain media of proof.¹ But in such cases the truth often is that the court takes notice of the fact itself which these books authenticate ; and wherever that is so, a court may refer to whatever source of information it pleases,—the statement that it may consult an almanac or a general history being only an unnecessary and misleading specification of a particular sort of document that may be examined.²

(2.) It is to be observed that much is judicially noticed without proof, of which the court at a given moment may in fact know nothing. A statute may have been passed within a few hours or days, and be unknown to the court at the trial ; or a given fact as to the international relations of the government may not be in fact known, as in *Taylor v. Barclay*, before cited,³ where the judge informed himself by inquiring at the foreign office ; or the general meaning of language, where the expression was used in a document of many years ago, may not be known to the court without private study and reflection.⁴ In such cases not only may a court, as indeed it must, avail itself of every source of information which it finds helpful, but also, for the proper expedition of business, it may require help from the parties in thus instructing itself.⁵

(3.) Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima-facie* recognition, leaving the matter still open to controversy. It is true that as regards many of the things which are judicially noticed, it cannot well be supposed that they admit of question ; *e. g.*, that Missouri is east of the Rocky Mountains, and

¹ *R. v. Holt*, 5 T. R. 436; *R. v. Withers*, ib. 446; *Dupays v. Shepherd*, Holt, 296.

² *Gardner v. The Collector*, 6 Wall. 499; *State v. Morris*, 47 Conn. 179; *People v. Chee Kee*, 61 Cal. 404. In this last case the almanac used was an ordinary medical advertising almanac, Dr. Ayer's. And so in *Quelch's Case* (14 State Trials, 1083) counsel says, "We shall now (though there be no necessity for it) prove that . . . at the time . . . her sacred majesty and the King of Portugal were entered into a strict alliance," etc. "Upon this [goes on the report] two London Gazettes . . . were produced and two paragraphs were read."

³ 2 Sim. 213.

⁴ *Atty.-Gen. v. Dublin*, 38 N. H. 459.

⁵ *School Dist. v. Ins. Co.*, 101 U. S. 473; *Steph. Dig. Ev.*, art. 59.

that Hereford borders on Wales ; but the doctrine is by no means limited to that class of questions. A seal which purports to be the great seal of any State may in fact not be genuine, and so of the certificate and seal of any public official. A sale of tobacco and cigars may be made for medical purposes, although ordinarily it is not. In very many cases, then, the taking judicial notice of a fact is merely presuming it, assuming it until there shall be reason to think otherwise. Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine in helping to shorten and simplify trials ; it is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be. This function is, indeed, a delicate one ;¹ if it is too loosely or ignorantly exercised it may annul the principles of evidence and even of substantive law. But the failure to exercise it tends daily to smother our trials with technicality, and monstrously lengthens them out.

(4) Another thing should be observed, which often escapes attention, viz., that the thing of which a court is asked to take cognizance without proof is often a totally different matter from what it appears to be ; so that their refusal is misconceived and misquoted. Thus, in Phillips on Evidence,² one reads that "the courts . . . will not take notice . . . of any particular city ; as, for instance, that Dublin is in Ireland," citing *Kearney v. King*, 2 B. & Ald. 301. But that case decides no such thing ; the question was whether a declaration in assumpsit on a bill drawn at Dublin for a certain number of pounds, etc., without any averment to show the facts that it was drawn in Ireland and for Irish currency, could be read as importing those facts, and it was held that it could not. "It is not possible," said Abbott, C. J., "for the court to take judicial notice *that there is only one Dublin in the world*." Again, where a suit was brought in Texas on a promissory note payable at New Orleans, and no averment that this New Orleans was in Louisiana, the defect was supplied by other matter upon the record ; but the court thought that they could not

¹ *Cum multa putentur notoria quæ revera notoria non sunt, prospicere debet iudex ne quid dabitur est pro notorio recipiat.* Calvinus (A.D. 1600) sub probatio.

² I. 466 (10th Eng. ed.); c. X. s. 1, *end*.

judicially know that the note was payable in Louisiana.¹ Everybody in this country knows, to be sure, or may know for the asking, that there is a New Orleans in Louisiana; but few could say whether there be not another New Orleans in another State, or in a dozen of them. In like manner in an English case,² on a motion to set aside the service of a summons as not conforming to a statute which required the indorsement on it of the name and place of abode of the attorney suing it out, the actual indorsement was, "Featherstone buildings, Holborn, in the County of Surrey;" and the objection was that, upon the face of it, it was irregular, as it was well known that this place and street were in Middlesex and not in Surrey. But Wightman, J.: "I cannot take judicial notice that there is no such place in the County of Surrey."³ Another case,⁴ in which an English court is generally quoted as refusing to recognize without evidence that the Tower of London is in London, may illustrate the need of scrutiny and discrimination before accepting such paradoxical statements. The case was on a rule for setting aside a nonsuit and giving a new trial, which was, in fact, made absolute on paying costs. But the court refused to do this, as of strict right, and to say that the court below ought to have taken notice without proof that a certain part of the Tower of London was in the city of London instead of being in Middlesex. The point turned upon the fact, that although much of London is in the County of Middlesex, yet much of it, for judicial and political purposes, is not; and the line was said to pass through the Tower.⁵ The decision, therefore, is merely that a court is not required to take notice without proof of the precise boundary line of a county; a very different thing from holding that they cannot and should not take notice without proof that an object admitted to be the famous Tower of

¹ *Andrews v. Hoxie*, 5 Tex. 171. This case was cited by the court in *Ellis v. Park*, 8 Tex. 205, to support the holding that they could not take judicial notice that "St. Louis, Mo.," meant St. Louis in Missouri; but that was a very different thing, and, as it seems, indefensible. *Price v. Page*, 24 Mo. 65.

² *Humphreys v. Budd*, 9 Dowl. 1000.

³ And so *Bayley, J.*, in *Deybel's Case*, 4 B. & Ald. p. 246.

⁴ *Brune v. Thompson*, 2 Q. B. 789.

⁵ "This," says Coke, in the Fourth Institute, 251, "upon view and examination was found out Mic. 13 Jac. regis [1615], in the case of Sir Thomas Overbury, who was poysoned in a chamber in the Tower on the west part of that old wall." What is on the west of the wall is said to be in London, and on the east in Middlesex. And so Coke, Third Inst. 136. These passages are cited by counsel in 2 Q. B. 789.

London is in what is popularly and generally known as London.¹ In another case a learned author² misconceives, apparently, the scope of a Maryland case. "The courts," he remarks, "have refused, more or less capriciously, to take judicial notice of . . . [among other things] the meaning of a printer's private mark to an advertisement, thus, 'Oct. 13, 4t,' as indicating the date and term of publication;" and he cites *Johnson v. Robertson*, 31 Md. 476. But in reality the court, in that case, was declining not merely to notice the meaning of this expression, but to infer from the use of it that a certain advertisement *actually was published* on the date named, and three times afterwards; and to do this where the question was as to the meaning of the record, in determining whether a mortgage had been properly foreclosed. Finally, a case may be mentioned under this head,³ where a hotel-keeper, now bankrupt, had hired his furniture from a furniture dealer. Upon his becoming bankrupt the furniture was claimed for the creditors as having been left in the credit and disposition of the bankrupt; but the dealer claimed on the ground that the custom of letting furniture to hotel-keepers without passing the title to it was established and generally known. The court, in considering whether they could take notice of this without proof, drew attention to the fact that the real question was not as to the mere existence of the custom, but whether it had existed so long and been so extensively acted on that ordinary creditors of the hotel-keeper, "the wine merchant, the spirit merchant, the brewer, the ordinary tradesman of his town, were likely to know that it exists."

Without going further into detail, enough has now been said to accomplish my purpose, — that of indicating the place in our law of the subject of judicial notice, and of pointing out and illustrating its main features.

James B. Thayer.

CAMBRIDGE.

¹ Wharton (Ev. i. s. 339, notes) apparently supposes this last to be the decision, when he says that in this case "the court went to the absurd extreme of nonsuiting the plaintiff because he did not prove that the Tower of London was in the city of London."

² Wade on Notice (2d ed.), s. 1417. Mr. Wade has a useful collection of cases, and I am indebted to him for several references.

³ *Ex parte Powell*, 1 Ch. Div. 501.

THE DISSEISIN OF CHATTELS.

II.

THE NATURE OF OWNERSHIP.

IN a preceding paper the writer endeavored to show, in the light of history, that disseisin was not a feudal doctrine, but a principle of property in general, personal as well as real. Conversion of chattels, we found, differed from disseisin of land in name, but not in substance. In each case the effect of the tort was to transfer the *res* to the wrong-doer, and to cut down the interest of the party wronged to a mere right to recover the *res*. Or, as the sagacious Brian, C. J., put it, the one had the property, the other only the right of property.

The disseisor, whether of land or chattels, was said to have the property, for these reasons. So long as the disseisin continued he had the power of present enjoyment of the *res*; his interest, although liable to be determined at any moment by the disseisee, was as fully protected against all other assailants as the interest of an absolute owner; and, finally, his interest was freely transferable, both by his own act and by operation of law, although, of course, by reason of its precarious nature, its exchangeable value was small. The disseisee, on the other hand, was said to have a mere right of property, because, although he was entitled to recover the *res* by self-redress, or by action at law, this was his only right. The disseisin deprived him of the two conspicuous marks of perfect ownership. He could neither enjoy the land or chattel *in specie*, nor bring either of them to market. The interest of the disseisor might have little exchangeable value; but that of the disseisee had none. For, as we have seen, this interest, being a *chose* in action, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law.

Are these doctrines of the old common law accidents of English legal history, or are they founded in the nature of things? Do they chiefly concern the legal antiquarian, or have they also a practical bearing upon the litigation of to-day? To answer these

questions, it will be necessary, in the first place, to analyze the idea of "ownership" or "property," in the hope of working out a definition that will bear the test of application to concrete cases; and, secondly, an attempt must be made to explain the reason of the rule that *choses* in action are not assignable.

It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently, the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that whenever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then, and then only, is the title completely legal."¹

A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by

¹ 2 Bl. Com. 199. See also *ibid.* 196: "And, at all events, without such actual possession no title can be completely good."

which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur autre vie* is owner of the residue of the life estate. For no one during the life of *cestui que vie* can legally disturb him.

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.

There is one curious case of derivative title which may be thought to confirm in a somewhat striking manner the accuracy of the definition here suggested. If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainderman no remedy against the life tenant. There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bail.

ment ; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death ; he could not create a duty binding only his executor.¹ Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute.²

Another rule, now obsolete, admits of a similar explanation. In the fourteenth century, as we have seen, a trespasser acquired the absolute property in the chattel wrongfully taken. The common law gave the dispossessed owner no remedy for its recovery. There was no assize of novel disseisin for chattels. Replevin was restricted to cases of wrongful distress. Detinue, originally founded upon a bailment, and afterwards extended to cases of losing and finding, was not allowed against a trespasser until about 1600. Trespass was therefore the owner's only action ; but Trespass sounded in damages. The trespasser's possession being inviolable, he was necessarily owner.

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it, as if it were the seller's own, the purchaser gets at law only the seisin. The original owner's title, that is, his right to recover the seisin, is not otherwise affected by the conveyance. But a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

Where the two elements of ownership are severed, as by a disseisin, and vested in two persons, either may conceivably make his defective title perfect ; but the mode of accomplishing this is different in the two cases. The disseisee may regain his lost possession by entry or recaption, by action at law, or by a voluntary surrender on the part of the disseisor. In each of these ways his title becomes complete, and is the result of a transfer, voluntary or involuntary, of the physical *res*.

The perfection of the title of the disseisor, on the other hand, is

¹ *Perrot v. Austin*, Cro. El. 222; *Cover v. Stem*, 67 Md. 449.

² After a time the chancellors gave relief by compelling life tenants to give bonds that the reversioners and remaindermen should have the chattels. *Warman v. Seaman*, Freem. C. C. 306, 307; *Howard v. Duke of Norfolk*, 2 Sw. 464; 1 Fonb. Eq. 213, n. And now either in equity or at law the reversioners and remaindermen are amply protected. The learning on this point, together with a full citation of the authorities, may be found in *Gray, Perpetuities*, §§ 78-98.

not accomplished through a transfer to him of the disseisee's right to recover possession. In the very nature of things, this right of the dispossessed owner cannot be conveyed to the wrongful possessor. It would be absurd to speak of such possessor acquiring a right to recover possession from himself, which would be the necessary consequence of the supposed transfer. But the disseisee's right, although not transferable, may, nevertheless, be extinguished. And since, by its extinguishment, the possession of the disseisor becomes legally unassailable, the latter's ownership is thereby complete.

The extinguishment may come about in divers ways :—

(1.) *By a release.* "Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor and the uniting the right to the possession completes the title of the releasee."¹ In feoffments and grants it was a rule that the word "heirs" was essential to the creation of an estate of inheritance. But, as Coke tells us, "When a bare right is released, as when the disseisee releases to the disseisor all his right, he need not speake of his heires."² This distinction would seem to be due to the fact that a release operates, not as a true conveyance, but by way of extinguishment.

(2.) *By marriage.* As we have seen in the preceding article,³ if a woman, who was dispossessed of her land or chattels, married, her right of action against the wrong-doer not being assignable, did not pass to her husband. If, therefore, she died before possession was regained, the husband had no curtesy in the land, and the right to recover the chattel passed to her representative. But if the dispossessed woman can be imagined to marry the dispossessor, it seems clear, although no authority has been found,⁴ that in that highly improbable case the marriage, by suspending and consequently extinguishing her right of action, would give the husband a fee simple in the land and absolute ownership of the chattel.

(3.) *By death.* If a man were disseised by his eldest son and died, the son and heir would be complete owner; for death would

¹ Co. Lit. 274 a, Buker's note [237].

² Co. Lit. 9 b.

³ *Supra*, 27, 38.

⁴ A woman by marrying her bailee or debtor extinguished the bailment or debt. Y. B. 21 H. VII. 29-4.

have removed the only person in the world who could legally assail his possession. The law of trusts furnishes another illustration. The right of a *cestui que trust*, it is true, is not a right *in rem*, but a right *in personam*. Nevertheless it relates to a specific *res*, and so long as it exists, practically deprives the trustee of the benefits of ownership. If this right of the *cestui que trust* could be annihilated, the trustee would be owner in substance as well as in name. This annihilation occurred in England, if the *cestui que trust* of land died intestate and without heirs, inasmuch as a trust of land did not escheat to the crown or other feudal lord.¹ The trust was said to sink for the benefit of the trustee, and for the obvious reason that no one could call him to account.

(4) *By lapse of time.* Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.² As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from

¹ *Burgess v. Wheate*, 1 W. Bl. 123; *Ames Cas. on Trusts*, 501, 511, n. 1. By St. 47 and 48 Vict. c. 71, § 4, equitable interests do now escheat. It has been urged by Mr. F. W. Hardman, with great ability, that a trust in land ought to have been held to pass to the sovereign after the analogy of *bona vacantia*. 4 L. Q. Rev. 330-336. And this view has met with favor in this country. *Johnston v. Spicer*, 107 N. Y. 185; *Ames, Cas. on Trusts*, 511, n. 1.

² The writer regrets to find himself in disaccord upon this point with the opinion expressed incidentally by Professor Langdell, in his summary of Equity Pleading (2 ed.), § 122.

Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione per patientiam et negligentiam veri domini.*"¹

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title."² Lord Mansfield may also be cited: "Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."³

Sir Thomas Plummer, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity."⁴

There are, to be sure, occasional *dicta* to the effect that the statute of James I. only barred the remedy without extinguishing the right, and that the right which would support a writ of right or other *droitural* action never died. An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.⁵ Fortunately these

¹ Bract. 52 a.

² 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, Conveyancing (5 ed.), 270; Stokes v. Berry, 2 Salk. 421, per Lord Holt. Butler's note in Co. Lit. 239 a is as follows: "But if A. permits the possession to be withheld from him [by B.] beyond a certain period of time, without claiming it . . . B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right . . . so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete."

³ Taylor v. Horde, 1 Burr. 60, 119.

⁴ Cholmondeley v. Clinton, 2 Jac. & W. 1, 156.

⁵ The notion that a debt survives the extinction of all remedies for its enforcement is peculiar to English and American law, and even in those systems cannot fairly be deduced from the authorities commonly cited in its support. It is not because the debt continues, that a new promise to pay a debt barred by the statute is binding; but because the extinguishment of the creditor's right is not equivalent to performance by the debtor. The moral duty to pay for the *quid pro quo* remains, and is sufficient to support the new promise. It is because this moral duty remains that the debtor, though discharged from all actions, cannot, without payment, recover any security that the creditor may hold. Again, it has been urged that the statute affects the remedy, but not the right, because

dicta have had no other effect than to bring some unnecessary confusion of ideas into this subject. The logic of facts has proved irresistible in the decision of concrete cases. The courts have uniformly held that a title gained by lapse of time is not to be distinguished from a title acquired by grant. Thus, if the prescriptive owner desires to transfer his title, he must observe the usual formalities of a conveyance; he cannot revest the title in the disseisee by disclaiming the benefit of the statute.¹ His title is so perfect that a court of equity will compel its acceptance by a purchaser.² A repeal of the statute will not affect his title.³ If dispossessed by the disseisee after the statute has run, he may enforce his right of entry or action against him as he might against any other intruder.⁴ He may even maintain a bill in equity to remove the cloud upon his title, created by the documentary title of the original owner.⁵ The English cases cited in support of these propositions, it may be urged, were decided under St. 3 and 4 Wm. IV. c. 27, the 34th

the lapse of the statutory time in the jurisdiction of the debtor is no bar to an action in another jurisdiction. But this rule admits of another explanation. A debt being transitory, a creditor has an option, from the moment of its creation, to sue the debtor wherever he can find him. The expiration of the period of limitation in one jurisdiction, before he exercises his option, has no effect upon his right to sue elsewhere. But it extinguishes his right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revive it. Cooley, Const. Lim. 365. The case of *Campbell v. Holt*, 115 U. S. 620, *contra*, stands almost alone.

¹ *Sanders v. Sanders*, 19 Ch. Div. 373; *Hobbs v. Wade*, 36 Ch. D. 553; *Jack v. Walsh*, 4 Ir. L. R. 254; *Doe v. Henderson*, 3 Up. Can. Q. B. 486; *McIntyre v. Canada Co.*, 18 Grant, Ch. 367; *Bird v. Lisbros*, 9 Cal. 1, 5 (*semble*); *School District v. Benson*, 31 Me. 381; *Austin v. Bailey*, 37 Vt. 219; *Hodges v. Eddy*, 41 Vt. 485.

² *Scott v. Nixon*, 3 Dr. & War. 388, 405; *Sands v. Thompson*, 22 Ch. D. 614; *Games v. Bonnor*, 54 L. J. Ch. 517.

³ *Campbell v. Holt*, 115 U. S. 620, 622 (*semble*); *Trim v. McPherson*, 7 Cold. 15; *Grigsby v. Peak*, 57 Tex. 142; *Sprecker v. Wakely*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245.

⁴ *Brassington v. Llewellyn*, 27 L. J. Ex. 297; *Bryan v. Cowdal*, 21 W. R. 693; *Rains v. Buxton*, 14 Ch. D. 537; *Groome v. Blake*, 8 Ir. C. L. 428; *Mulholland v. Conklin*, 22 Up. Can. C. P. 372; *Johnston v. Oliver*, 3 Ont. R. 26; *Holtzapple v. Phillibaum*, 4 Wash. 356; *Barclay v. Smith*, 66 Ala. 230 (*semble*); *Jacks v. Chaffin*, 34 Ark. 534; *Clarke v. Gilbert*, 39 Conn. 94; *Doe v. Lancaster*, 5 Ga. 39; *McDuffee v. Sinnott*, 119 Ill. 449; *Brown v. Anderson*, 90 Ind. 93; *Chiles v. Jones*, 4 Dana, 479; *Armstrong v. Risteau*, 5 Md. 256; *Littlefield v. Boston*, 146 Mass. 268; *Jones v. Brandon*, 59 Miss. 585; *Biddle v. Mellon*, 13 Mo. 335; *Jackson v. Oltz*, 8 Wend. 440; *Pace v. Staton*, 4 Ired. 32; *Pederick v. Searle*, 5 S. & R. 236; *Abel v. Hutto*, 8 Rich. 42.

⁵ *Low v. Morrison*, 14 Grant, Ch. 192; *Pendleton v. Alexander*, 8 Cranch, 462; *Arrington v. Liscom*, 34 Cal. 365; *Tracy v. Newton*, 57 Iowa, 210; *Rayner v. Lee*, 20 Mich. 384; *Stettinische v. Lamb*, 18 Neb. 619; *Watson v. Jeffrey*, 39 N. J. Eq. 62; *Parker v. Metzger*, 12 Oreg. 407.

section of which expressly extinguishes the title of the original owner at the end of the time limited. But inasmuch as the American cases cited were decided under statutes substantially like St. 21 James I. c. 16, which contains no allusion to any extinguishment of title, the 34th section referred to may fairly be regarded as pure surplusage.

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.¹ The vice being thus removed, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. Accordingly, the adverse possessor cannot restore the title to the original owner by waiving the benefit of the statute.² His title is not affected by a repeal of the statute.³ If dispossessed by the original owner, he may maintain Detinue or Replevin against the latter, as he might against any stranger.⁴ A

¹ *Ex parte Drake*, 5 Ch. Div. 866, 868; *Chapin v. Freeland*, 142 Mass. 383; cases cited *infra*, n. 4.

According to Littleton, a right of entry or recaption is not extinguished by a release of all actions; and in *Put v. Rawsterne*, Skin. 48, 57, 2 Mod. 318, there is a *dictum* that the right of recaption is not lost, although all rights of action are merged in a judgment in trover. It may be that Littleton's interpretation would be followed to-day, although it certainly savors of scholasticism. But the *dictum* in *Put v. Rawsterne*, surely, cannot be law.

² *Morris v. Lyon*, 84 Va. 331.

³ *Campbell v. Holt*, 115 U. S. 623 (*semble*); *Jones v. Jones*, 18 Ala. 245, 253 (*semble*); *Davis v. Minor*, 2 Miss. 183, 189-90 (*semble*); *Power v. Telford*, 60 Miss. 195 (*semble*); *Moore v. State*, 43 N. J. 203, 206 (*semble*); *Yancy v. Yancy*, 5 Heisk. 353; *Brown v. Parker*, 28 Wis. 21, 28 (*semble*).

⁴ *Brent v. Chapman*, 5 Cranch, 358; *Shelby v. Guy*, 11 Wheat. 361 (*semble*); *Howell v. Hair*, 15 Ala. 194; *Sadler v. Sadler*, 16 Ark. 628; *Wynn v. Lee*, 5 Ga. 217 (*semble*); *Robbins v. Sackett*, 23 Kas. 301; *Stanley v. Earl*, 5 Litt. 281; *Smart v. Baugh*, 3 J. J. Marsh. 363 (*semble*); *Clark v. Slaughter*, 34 Miss. 65; *Chapin v. Freeland*, 142 Mass. 383 (Field, J., diss.); *Baker v. Chase*, 55 N. H. 61, 63 (*semble*); *Powell v. Powell*, 1 Dev. & B. Eq. 379; *Call v. Ellis*, 10 Ired. 250; *Cockfield v. Hudson*, 1 Brev. 311; *Gregg v. Bigham*, 1 Hill (S. Ca.), 299; *Simon v. Fox*, 12 Rich. 392; *McGowan v. Reid*, 27 S. Ca. 262, 267 (*semble*); *Kegler v. Miles*, Mart. & Y. 426; *Partee v. Badget*, 4 Yerg. 174; *Wheaton v. Weld*, 9 Humph. 773; *Winburn v. Cochran*, 9 Tex. 123; *Connor v. Hawkins*, 71 Tex. 582; *Preston v. Briggs*, 16 Vt. 124, 130; *Newby v. Blakey*, 3 Hen. & M. 57.

title gained by lapse of time in one State is good everywhere.¹ If insolvent, he cannot surrender the chattel to the original owner.² If sued by the original owner, he may plead in denial of the plaintiff's title.³

In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute was complete. But before that time the wrong-doer may have parted with the *res* by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrong-doer.

If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the statute of limitations is concerned, only this difference: the title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter. Let us suppose, for example, that B. disseises A., occupies for ten years, and then conveys to C. If the statutory period be assumed to be twenty years, B.'s title at the time of the transfer is good against every one except A., but is limited by the latter's right to recover possession at any time during the ensuing ten years. B.'s title, thus qualified, passes to C. At the end of the second ten years the qualification vanishes, and C. is complete owner. This, it is believed, is the rationale of the oft-repeated rule that the times of successive adverse holders, standing in privity with each other, may be tacked together to

¹ *Shelby v. Guy*, 11 Wheat. 361; *Goodman v. Munka*, 8 Port. 84, 94-5; *Howell v. Hair*, 15 Ala. 194 (*semble*); *Newcombe v. Leavitt*, 22 Ala. 631; *Wynn v. Lee*, 5 Ga. 217; *Broh v. Jenkins*, 9 Mart 526 (*semble*); *Davis v. Minor*, 2 Miss. 183 (*semble*); *Fears v. Sykes*, 35 Miss. 633; *Moore v. State*, 43 N. J. 203, 205, 208 (*semble*); *Alexander v. Burnet*, 5 Rich. 189 (*semble*); *Sprecker v. Wakeley*, 11, Wis. 432, 440 (*semble*).

² *Gath v. Barksdale*, 5 Muf. 101.

³ *Campbell v. Holt*, 115 U. S. 623 (*semble*); *Smart v. Baugh*, 3 J. J. Marsh. 363; *Smart v. Johnson*, 3 J. J. Marsh. 373; *Duckett v. Crider*, 11 B. Mon. 188; *Elam v. Bass*, 4 Muf. 301.

The general rule is asserted also in *Bryan v. Weems*, 29 Ala. 423; *Pryor v. Ryburn*, 16 Ark. 671; *Crabtree v. McDaniel*, 17 Ark. 222; *Machin v. Thompson*, 17 Ark. 199; *Blackburn v. Morton*, 18 Ark. 384; *Morine v. Wilson*, 19 Ark. 520; *Ewell v. Tidwell*, 20 Ark. 136; *Spencer v. McDonald*, 22 Ark. 466; *Curtis v. Daniel*, 23 Ark. 362; *Paschal v. Davis*, 3 Ga. 256, 265; *Wellborn v. Weaver*, 17 Ga. 267; *Thompson v. Caldwell*, 3 Litt. 136; *Orr v. Pickett*, 3 J. J. Marsh. 269, 278; *Martin v. Dunn*, 30 Miss. 264, 268; *Hardeson v. Hays*, 4 Yerg. 507; *Prince v. Broach*, 5 Sneed, 318; *Kirkman v. Philips*, 7 Heisk. 222; *Munson v. Hallowell*, 26 Tex. 475; *Merrill v. Bullard*, 59 Vt., 389; *Garland v. Enos*, 4 Muf. 504.

Goodwin v. Morris, 9 Oreg. 322, is a solitary decision to the contrary.

make up the period of limitation. In regard to land, this rule of tacking is all but universal.¹

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land.² A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the dispossessed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted, if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself,—a conclusion as shocking in point of justice as it would be anomalous in law.

It remains to consider the operation of the statute when the disseisor or converter has been, in turn, dispossessed by a wrong-doer. A change of possession accomplished in this mode has no more effect upon the right of the original owner than a change of possession by means of a transfer. But the rights and relations of the two successive adverse possessors are fundamentally different in the two cases. Let us suppose, as before, that B disseises A., and occupies for ten years, and then, instead of selling to C., is disseised

¹ *Ancestor and heir.* Doe v. Lawley, 13 Q. B. 954; Clarke v. Clarke, Ir R. 2 C. L. 395; Currier v. Gale, 9 All. 522; Duren v. Kee, 26 S. Ca. 224.

Devisee and devisee. Newcomb v. Stebbins, 9 Met. 545; Shaw v. Nicholay, 30 Mo. 99; Caston v. Caston, 2 Rich. Eq. 1.

Vendor and vendee. Simmons v. Shipman, 15 Ont. R. 301; Christy v. Alford, 17 How. 601; Riggs v. Fuller, 54 Ala. 141; Smith v. Chapin, 31 Conn. 530; Webster v. Anderson, 73 Ill. 439; Durel v. Tennison, 31 La. An. 538; Chadbourne v. Swan, 40 Me. 260; Hanson v. Johnson, 62 Md. 25; Crispen v. Hannavan, 50 Mo. 536; McNeely v. Langan, 22 Oh. St. 32; Overfield v. Christie, 7 S. & R. 173; Clarke v. Chase, 5 Sneed, 636; Cook v. Dennis, 61 Tex. 246; Day v. Wilder, 47 Vt. 583. But see *contra*, King v. Smith, Rice, 10; Johnson v. Cobb, 29 S. Ca. 372.

Lessor and lessee. Melvin v. Proprietors, 5 Met. 15; Sherin v. Brackett, 36 Minn. 152.

Judgment debtor and execution purchaser. Searcy v. Reardon, 1 A. K. Marsh. 3; Chouquette v. Barada, 23 Mo. 331; Scheetz v. Fitzwater, 5 Barr, 126.

Wife and tenant by curtesy. Colgan v. Pellens, 48 N. J. 27, 49 N. J. 694.

See further, McEntie v. Brown, 28 Ind. 347; Haynes v. Boardman, 119 Mass. 414; St. Louis v. Gorman, 29 Mo. 593; Hickman v. Link, 97 Mo. 482.

² Bohannon v. Chapman, 17 Ala. 696; Newcombe v. Leavitt, 22 Ala. 631; Shute v. Wade, 5 Verg. 1, 12 (*semble*); Norment v. Smith, 1 Humph. 46, 48 (*semble*); (but see Wells v. Ragland, 1 Swan, 501; Hobbs v. Ballard, 5 Sneed, 395), *accord*.

Tacking not being allowed in regard to land in South Carolina, is naturally not permitted there in the case of chattels. Beadle v. Hunter, 3 Strob. 331; Alexander v. Burnet, 5 Rich. 189; Dillard v. Philson, 5 Strob. 213 (*semble*).

by C., who occupies for another ten years. At the moment of the second disseisin B's possession is qualified by A.'s right to recover the *res* at any time during the next ten years. After the disseisin C.'s possession would, of course, be subject to the same qualification. But B. had as against the rest of the world the two elements of perfect ownership,—possession and the unlimited right of possession. C. by disseising B. severs these two elements of B.'s title, good against every one but A., in the same way that B. by his tort had previously divided A.'s ownership, good against every one without exception. Just as by the original disseisin B. acquired the *res* subject to A.'s right of entry or action for twenty years, so by the second disseisin C. acquires the *res* subject to B.'s right of entry or action for an equal period. There would be, therefore, two defects in C.'s title; namely, A.'s right to recover the *res* for ten years, and B.'s right to recover it for twenty years from the time of the second disseisin. If A. fails to assert his claim during his ten years, his right is gone forever. One of the defects of C.'s title is blotted out. He becomes owner against every one but B. He may, accordingly, at any time thereafter defend successfully an action brought by A., or if forcibly dispossessed by A., he may recover the *res* from him by entry or action as he might against any other dispossessor, B. alone excepted. In other words, C., although a disseisor, and therefore not in privity with B., may tack the time of B.'s adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States.¹ There are, however, some decisions and a widespread opinion to the contrary in this country.² But

¹ *Doe v. Carter*, 9 Q. B. 863; *Kipp v. Synod*, 33 Up. Can. Q. B. 220; *Fanning v. Willcox*, 3 Day, 258; *Smith v. Chapin*, 31 Conn. 530 (*semble*); *Shannon v. Kinny*, 1 A. K. Marsh. 3; *Hord v. Walton*, 2 A. K. Marsh. 620; *Fitzrandolph v. Norman*, 2 Tayl. 131; *Candler v. Lunsford*, 4 Dev. & B. 407; *Davis v. McArthur*, 78 N. C. 357; *Cowles v. Hall*, 90 N. C. 330. See, also, 1 Dart, V. & P. (6 ed.) 464-6; *Pollock and Wright, Possession* 23.

² *San Francisco v. Fulde*, 37 Cal. 349; *Doe v. Brown*, 4 Ind. 143 (*semble*); *Sawyer v. Kendall*, 10 Cush. 241; *Witt v. St. Paul Co.*, 38 Minn. 122 (*semble*); *Locke v. Whitney*, 63 N. H. 597 (*semble*); *Jackson v. Leonard*, 9 Cow. 653; *Moore v. Collishaw*, 10 Barr, 224; *Shack v. Zubler*, 34 Pa. 38; *Erck v. Church*, 87 Tenn. 575; *Graeven v. Dieves*, 68 Wis. 317 (*semble*). See, also, *Riopelle v. Hilman*, 23 Mich. 33.

Doe v. Barnard, 13 Q. B. 945, lends no countenance to the cases just cited. In that case B. occupied without right for eighteen years, and died leaving a son; C. excluded the son and occupied for thirteen years, when he was ousted out by A., the original owner. C. brought ejectment against A., but failed; not, however, because of any right in A.; on the contrary, the latter, as plaintiff, in an ejectment against C., had been already defeated

this opinion, with all deference, must be deemed erroneous. The laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same, and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors. If, indeed, the adverse possession is not continuous, if, for instance, B., after disseising A., abandons the land, leaving the possession vacant, and C. subsequently enters without right upon this vacant possession, he cannot, of course, tack his time to B.'s.¹ Upon B.'s abandonment of the land the disseisin comes to an end. In legal contemplation, A.'s possession revives.² Having the right to possess, and no one else having actual possession, he is in a position analogous to that of an heir, or conusee of a fine, before entry, and like them has a seisin in law. C.'s disseisin has, therefore, the same effect as if A. had never been disseised by B., and A.'s right of entry or action must continue until C. himself, or C. and his successors, have held adversely for twenty years. If the distinction here suggested between successive disseisins with continuous adverse possession, and successive disseisins without

because the statute had extinguished his title. *Doe v. Carter*, 9 Q. B. 863. The court decided against C. in *Doe v. Barnard*, on the ground that he, being a disseisor of A.'s heir, who had the superior right, could not maintain ejectment at all, even against a wrongful dispossessor. This view, although allowed in *Nagle v. Shea*, Ir. R. 8 C. L. 224, is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrong-doer by entry, by assize, or by ejectment; *Bract. f. 165 a*; 1 *Nich. Britt.* 296; *Bateman v. Allen*, Cro. El. 437, 438; *Jenk. Cent.* 42; *Allen v. Rivington*, 2 *Saund.* 111; *Smith v. Oxenden*, 1 Ch. Ca. 25; *Doe v. Dyball*, M. & M. 346; *Davison v. Gent*, 1 H. & N. 744, per Bramwell, B. This time-honored rule is universally prevalent in this country. The doctrine of *Doe v. Barnard* is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C., the unsuccessful plaintiff, has only to eject A. by force in order to turn the tables upon him. Once in possession, he could defeat a new ejectment brought by A., in the same way that he himself had been rebuffed; that is, by setting up the superior right of B.'s heir. Fortunately *Doe v. Barnard* has been overruled, in effect, by *Asher v. Whitlock*, L. R. 1 Q. B. 1. The suggestion of Mellor, J., in the latter case, although adopted by Mr. Pollock (*Poll. & Wr., Poss.* 97, 99), that the former case may be supported on the ground that the superior right of B.'s heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless.

¹ *Brandt v. Ogden*, 1 Johns. 156; *Malloy v. Bruden*, 86 N. C. 251; *Taylor v. Burnside*, 1 Grat. 165. See, also, *Brown v. Hanauer*, 48 Ark. 277.

² *Agency Co. v. Short*, 13 App. Cas. 793.

continuous adverse possession, had been kept in mind, a different result, it is believed, would have been reached in the American cases.¹

If the conclusions here advocated are true in regard to land, they would seem to be equally valid where there is a continuous adverse possession of chattels by successive holders, although there is no privity between them. But no decisions have been discovered upon this point.²

(5.) *By judgment.* One who has been wrongfully dispossessed of a chattel has the option of suing the wrong-doer in Replevin, Detinue, Trover, or Trespass. A judgment in Replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in Detinue establishes his right to recover the chattel *in specie*,³ or, that being impracticable, its value. A judgment in Trespass or Trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others.⁴ Accordingly, a judgment in Trespass or Trover against a sole wrong-doer who, at the time of judgment recovered, is still in possession of the chattel operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession being thus set free from adverse claims, changes into ownership.⁵

¹ It is a significant fact that in most of these cases *Brandt v. Ogden*, 1 Johns. 156, a case where the adverse possession was not continuous, was cited as a decision in point.

² In *Norment v. Smith*, 1 Humph. 46; *Moffatt v. Buchanan*, 11 Humph. 369; *Wells v. Ragland*, 1 Swan. 501; *Hobbs v. Ballard*, 5 Sneed, 395, there was in fact a privity; but the court thought otherwise, and accordingly disallowed tacking, as the same court denies the right to tack in the case of land if there is no privity.

³ *Ex parte Drake*, 5 Ch. Div. 866; *Re Scarth*, 10 Ch. 234; *Sharpe v. Gray*, 5 B. Mon. 4; *Norrill v. Corley*, 2 Rich. Eq. 288, n. (a).

⁴ *Lacon v. Barnard*, Cro. Car. 35; *Put v. Rawsterne*, T. Ray. 472, 2 Show. 211 (*semble*); *Hitchin v. Campbell*, 2 W. Bl. 827; *Lovejoy v. Wallace*, 3 Wall. 1, 16 (*semble*); *Barb v. Fish*, 8 Black, 481; *Rembert v. Hally*, 10 Humph. 513. Similarly, if the converted chattel has been sold, the owner, by recovering a judgment *in assumpsit*, extinguishes all his other remedies against the converter. *Smith v. Baker*, L. R. 8 C. P. 350 (*semble*); *Bradley v. Brigham*, 149 Mass. 141, 144-5; *Boots v. Ferguson*, 46 Hun, 129; *Wright v. Ritterman*, 4 Rob. 704.

⁵ The chattel may therefore be taken on execution by a creditor of the converter. *Rogers v. Moore*, Rice, 60; *Norrill v. Corley*, 2 Rich. Eq. 288, n. (a); *Foreman v. Neilson*, 2 Rich. Eq. 287. See, also, *Morris v. Beckley*, 2 Mill, C. R. 227. A purchaser from a converter after judgment should take a perfect title. *Goff v. Craven*, 34 Hun, 150, *contra*, would seem to be a hasty decision.

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in Trespass or Trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in Trespass or Trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C.¹ It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.²

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in Trespass or Trover, all his rights against both are merged therein, and his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring Replevin or Detinue against the other to recover the chattel, or Trespass or Trover for its value; for the latter cannot invoke the maxim, *nemo bis vexari debet pro eadem causa*.³ Not until the judgment

¹ *Matthews v. Menedger*, 2 McL. 145; *Spivey v. Morris*, 18 Ala. 254; *Dow v. King* (Ark.) 12 S. W. Rep. 577; *Atwater v. Tupper*, 45 Conn. 144; *Sharp v. Gray*, 5 B. Mon. 4; *Osterhout v. Roberts*, 8 Cow. 43. But see *contra*, *March v. Pier*, 4 Rawle, 273, 286 (*semble*); *Fox v. Northern Liberties*, 3 W. & S. 103, 106 (*semble*); *Wilburn v. Bogan*, 1 Speer, 179.

Similarly, an unsatisfied judgment against C. is no bar to a subsequent action against B. *McGee v. Overby*, 12 Ark. 164; *Hopkins v. Hersey*, 20 Me. 449; *Bradley v. Brigham*, 149 Mass. 141, 144-5. But see *contra*, *Murrell v. Johnson*, 1 Hen. & M. 449.

² *Cooper v. Shepherd*, 3 C. B. 266.

³ *Lovejoy v. Murray*, 3 Wall. 1; *Elliot v. Porter*, 5 Dana, 299; *Elliott v. Hayden*, 104 Mass. 180; *Floyd v. Brown*, 1 Rawle, 121 (*semble*); *Fox v. Northern Liberties*, 3 W. & S. 103 (*semble*); *Sanderson v. Caldwell*, 2 Ark. 195.

But see *contra*, *Brown v. Wootton*, Yelv. 67, Cro. Jac. 73; *Adams v. Broughton*, Andr. 18; *Buckland v. Johnson*, 15 C. B. 145; *Hunt v. Bates*, 7 R. I. 217. In *Brinsmead v. Harrison*, L. R. 6 C. P. 584, L. R. 7 C. P. 547, one of the joint converters pleaded, to a court in Detinue, a prior judgment against his companion. The plaintiff now assigned a detention subsequent to the joint taking. The court, with some reluctance, held the

against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.

J. B. Ames.

CAMBRIDGE, 1890.

[*To be concluded in March.*]

plea good, but also supported the replication, thus neutralizing one error by the commission of another, and so bringing about the same result as the American cases. The fallacy of the notion that the detention of a chattel by the wrongful taker is a fresh tort, was exposed, curiously enough, by the same court in an earlier case in the same volume; *Wilkinson v. Verity*, L. R. 6 C. P. 206. Such a notion, as there pointed out, would virtually repeal the statute of limitations. See *Philpott v. Kelley*, 3 A. & E. 106.

HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in Chief.</i>
WILFRED BOLSTER,	GUY CUNNINGHAM,
HERBERT H. DARLING,	CHARLES I. GIDDINGS,
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
CHARLES E. SHATTUCK,	AARON C. THAYER,
EZRA R. THAYER.	

A CORRECTION.

To the Editors of the Harvard Law Review:

Since the publication of my article in the last number of the REVIEW, I have learned that the article in a Law Quarterly Review, 506, referred to by me in note 5, page 273, and described as "presumably from the pen of Sir Frederick Pollock," was not, in fact, written by him. I therefore desire to correct the statement.

Very truly yours,

WILLIAM SCHOFIELD.

BOSTON, Feb. 12, 1890.

THE case of *The Metropolitan Exhibition Company v. Ward* is a single combat between two of the chiefs in the greater battle between our base-ball capitalists and our base-ball players. The plaintiff company or its predecessors and the defendant on the 23d of April, 1889, entered into a contract by which the defendant agreed to play ball with the New York Base-Ball Club from 1st April to 31st October, 1889, on a certain salary. The plaintiff company had also by this agreement the right to "reserve" the defendant for the season of 1890 at a salary of not less than three thousand dollars, and in a club not to exceed fourteen members in number at the time of the reserve. The further right was given to the plaintiff company of terminating all obligations on this contract by ten days' notice given at any time. The services thus promised for the year 1889 have been performed by the defendant, and the money for them has been paid. The defendant has been reserved by the plaintiff company for the year 1890, but has been actively employed in the work of other base-ball clubs. The plaintiff company then files this bill to restrain the defendant from playing base-ball or rendering services of any kind for any one until 31st October, 1890, and a motion is made to enjoin the defendant until the hearing of the cause. The main question raised by the suit is, therefore, what is the legal effect of the "reserve" secured to the plaintiff company by the agreement of the 23d April, 1889?

Judge O'Brien refuses the preliminary injunction on the ground that a final judgment may be had very soon, and in the mean time the plaintiff can suffer no irreparable injury. Some comments are also made on the merits of the case and on the possibility of the plaintiff's final success.¹

It seems to us that the plaintiff company has a very good chance of obtaining a permanent injunction on the hearing of the cause. The plain construction of the word "reserve" is this: it is the right to keep, to hold for future use. Let us suppose that there was no stipulation except this reserve, that is, nothing was said about salary and other terms of reserve. Then no one could doubt that the plaintiff would get the relief he asks, for the right to reserve, if translated into terms of the defendant's duty, means that the defendant has bound himself absolutely by a negative covenant to play ball with no one but the plaintiff company. It is to be observed that this is not a positive promise to play with the plaintiff company, but only a negative promise to play with no one else. The plaintiff company has the absolute refusal, so to speak, of the defendant's services. It is the case of a negative unilateral contract, for the breach of which damages at law would be clearly inadequate, and which has been already broken or is actually threatened. If the reserve were unconditional, therefore, the merits would be clearly on the side of the plaintiff company.

What new element is introduced by the insertion of the provisos that the defendant shall be reserved, 1, at a salary of not less than three thousand dollars, and 2, in a club of not more than fourteen men at the time of the reserve? In the consideration of this question we may disregard the second proviso altogether, because it was a fact the existence of which was a condition precedent to the exercise of the power to reserve, and must be presumed now that the reserve has been made. But the contract provides that it shall be considered a condition precedent to the right to reserve that the defendant shall be reserved at a salary of three thousand dollars at least. In other words, by the exercise of the reserve the plaintiff company has become bound to pay the defendant a certain salary if he chooses to play ball with them. If the plaintiff company reserves the defendant, it must also employ him. But, again, it is to be observed that the defendant assumes no obligation to play with the plaintiff company; the defendant is given an offer which is to remain open as long as the reserve holds him from other employment. Thus, when the season opens the defendant is at liberty to retire from the diamond altogether and enter some other occupation, *e. g.*, the legal profession, for which in this case the defendant happens to be trained; or he may demand employment of the plaintiff company at a salary of three thousand dollars, and he may sue them if he is not employed or paid. But the fact that the defendant has this right against the plaintiff company can in no way diminish his obligation towards the plaintiff company. The promises of the plaintiff company and of the defendant do not, therefore, constitute mutual and dependent conditions, but they are independent and absolute. Hence the defendant is still bound by an absolute negative promise to play ball with no one but the plaintiff company, and this promise is one of the kind that equity usually enforces. We can answer, then, that the provisos make no difference in the legal effect of the reserve.

¹ New York Law Journal, 29th Jan., 1890.

Nor is it an objection that the plaintiff company may terminate all rights and obligations by ten days' notice. By coming into equity the plaintiff company must be taken to have waived this right forever, because the prayer for relief and the retention of a right of termination are two acts totally inconsistent with one another. This waiver can be made effective by the terms of the decree.

The final judgment of the Supreme Court of New York on this bill will be watched for with interest.

THE editors and publishers of newspapers about Boston have agreed to submit a petition to the General Court of Massachusetts, praying for a relaxation of the law of newspaper libel in favor of the newspapers, and they embody their prayer in the following proposed enactment; "No action or prosecution shall be maintained for the publication of any matter of legitimate interest to the public, if such publication is made without malice, and if the author or publisher thereof causes effectual retraction or correction to be made of anything untrue or mistaken in such publication as soon as practicable after being requested so to do by any person aggrieved by the original publication." On behalf of such an enactment it is urged that "it is contrary to all principles of justice to assume, as the present law does, that a publisher is guilty until he proves himself innocent; that such an assumption is directly the reverse of the commonly accepted axioms of law."

The consummation hoped for in the enactment of this new law has long since been realized in England. The statute 6 and 7 Vict. c. 96, s. 2 (1843), provided "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel," etc. Some such law was before the New York Legislature a year ago,¹ and we believe the question is not entirely new in the Massachusetts General Court. Minnesota has such a law. Michigan had a similar statute, but it was declared unconstitutional because it failed to provide a proper remedy for a wrong, and because it was class legislation.²

It is obvious that there is no such crying injustice in the present law as the authors of this petition seem to imagine. One who publishes a libel is held liable for damages because of the injury done, and not because of any malice, as the newspapers are told every day. But granting that the changes proposed are desirable from the point of view of expediency and policy, we think it clearly within the power of the Legislature to pass such an act. Such a law denies no one the "equal protection of the laws," because the law applies to a class. Moreover, within reasonable limits the Legislature must judge what is or is not a proper remedy for a given wrong.³

It would be extremely interesting to see some English testimony on the practical working of their law (Lord Campbell's Act), although English experience would be no sure guide for us.

¹ 30 Alb. L. J. p. 101, see also, pp. 181, 201.

² *Park v. Detroit Free Press Co.*, 40 N. W. Rep. 731 (Mich.).

³ *Allen v. Pioneer-Press Co.*, 40 Minn. 117.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

BACON'S MAXIM 25.—(*From Professor Thayer's Lectures.*)—Those do wisely, such as Wigram and Stephen and Nichols (in his excellent article in the Juridical Society Papers, ii. 351), who, in dealing with the parol-evidence rule, reject the use of Lord Bacon's maxim and commentary upon ambiguity. It does not help: it confuses. It is inextricably connected with a hopeless mass of mere jargon in our later books; and it cannot be understood by the mere reading of it,—you must turn on the light of a knowledge of the legal conceptions which were peculiar to the time, and of their fanciful and pedantic style of expression. And yet anything which has figured as this thing has and still does in the phraseology of one subject must be understood.

Bacon's conception appears to be this:—

1. When an ambiguity, *i.e.*, a doubtful meaning, appears on the mere face of the document, you cannot cure it by extrinsic matter, because this would be a mingling of a matter of specialty with matter of fact, *i.e.*, extrinsic matter of the "inferior" grade. [He then illustrates by cases where the attempt is to show the intention, pure and simple, of the maker of a specialty. His conception is of an attempt to remove the doubt by *giving effect and operation* to an unexpressed intention; he is not thinking of a merely evidential use of such an intention, like that which Wigram refers to, in his paragraph 79.] But, he goes on, it may be cured sometimes by construction [*i.e.*, by a comparison of all parts of the paper together, where, indeed, as we observe, the curing of the doubt comes from ascertaining that, all things being considered, there is none] or by election [*i.e.*, in virtue of the doctrine that a certain party has his choice of several possible meanings.]

2. A latent ambiguity, *i.e.*, one which does not present itself upon the face of the paper, upon the bare reading of it, but is revealed by extrinsic matter—may be cured by extrinsic matter; for, in doing this there is no mingling of the incongruous things matter of specialty and matter of fact, but the mere meeting of one matter of fact by another. Yet two things, he goes on, are to be observed; viz., (a) the doctrine of election applies equally whether the ground for it appears on the face of the paper, or only be revealed by extrinsic matter; and (b) the mere intention of the writer, although, indeed, it be extrinsic matter, "matter in fact," cannot be used to cure a latent ambiguity, unless it be one of equivocation; for in that case only is there an expression in the writing of this intention,—an expression which, while it fits several things, does exactly fit and utter this intended thing.

In order to understand all this, we have to remember that Bacon is not talking or thinking about "evidence," in our sense of the word. He is expressing a doctrine about *giving effect and operation* to intention as discriminated from the writing itself. This cannot be done, he says, when it is unexpressed: it can be done when it is adequately

expressed, and at the same time expressed in an equivocal form, and only then. This conception, as I said before, is not that of using it evidentially,—all that sort of thing is more modern; it is the conception of letting the mere thought and purpose of the writer have an operation, by their own force, to cure and put life into an uncertain document, a thing never to be done, he means, when the uncertainty is in the very texture of the document itself; only to be done when the ambiguity is latent, and even then, only when it has the character of equivocation.

Two more things should be noticed: (1) What Bacon means by averment, an expression which generally and properly relates to pleading, may be seen by turning to the second paragraph of his Maxim 6, and recalling the ancient doctrine which survives and is familiar to us to-day, that a sheriff's return of having served a writ is conclusive. Bacon says: "As if the Sheriffe make a false returne that I am summoned, whereby I lose my land; yet because of the inconvenience of drawing all things to incertainty and delay, if the Sheriffe's returne should not bee credited, I am excluded of my averment against it, and am put to mine action of deceit against the Sheriffe and Summoners." The conception is not that of excluding a certain sort of evidence, but of excluding a certain ground of defence. (2) The second thing is an emphatic repetition and reminder that Bacon's maxim cannot be read alone; it must be illustrated by his commentary. For near the end of his preface to the "Maxims"—that admirable bit of discourse which begins with the famous remark, "I hold every man a debtor to his profession," etc.—Bacon has warned all who resort to his maxims in the clearest manner against this common and almost universal error in the use of them: "Lastly," he says, "there is one point above all the rest I accompt the most materiale for making these reasons indeed profitable and instructing, which is, that they be not set downe alone, like short darke Oracles, which every man will be content still to allow to bee true, but in the meane time they give little light or direction; but I have attended them (a matter not practised, no not in the civill law to any purpose; and for want whereof indeed the rules are but as proverbs, and many times plaine fallacies) with a cleere and perspicuous exposition, breaking them into cases, and opening them with distinctions, and sometimes shewing the reasons above whereupon they depend, and the affinity they have with other rules."

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — JURISDICTION — COLLISION — RAFTS. — Rev. Sts. U. S. § 3, defines "vessel" as including every "description of water-craft, or other artificial contrivance used, or capable of being used, as a means of transportation by water." *Held*, that a raft made of cross-ties, used as a convenient mode of bringing them to market, manned by a pilot and crew, who lived and had shelter thereon during a voyage of many days, propelled by the tides and by poles and large oars, was a vessel, so as to give jurisdiction to admiralty of a libel *in rem* against it for a collision on navigable waters. *Seabrook v. Raft of Railroad Cross-ties*, 40 Fed. Rep. 596 (S. C.).

AGENCY — BONDS — RATIFICATION.— An agent, having no authority in writing under seal, gave a bond on behalf of his principals, who were partners. *Held*, the act of the agent could be ratified by parol, and this ratification may be shown by facts and circumstances. *Palmer v. Seligman et al.*, 43 N. W. Rep. 974 (Mich.).

CONFLICT OF LAWS—CARRIERS.— The plaintiff made a contract of transportation with the defendant, which released the latter from liability for negligence. The contract was made in New York. It was valid under New York law, but void in Pennsylvania, where the case came up. *Held*, that a contract is governed by the law of the place where it is made, and that the New York rule should apply. *Forepaugh v. Del. L. & W. Railway Co.*, 18 Atl. Rep. 503 (Penn.).

The doubt in this case arose from a rule the U. S. courts laid down in *Swift v. Tyson*, 16 Peters, 1. A distinction is there drawn between statute and local law and a so-called commercial law. The first class, it is said, is peculiar to each State, and a decision of a State court is binding authority as to what the law is in that State. But the commercial law is uniform throughout the country, and it is competent for a U. S. court to decide questions *contra* to State decisions. This is followed in a late case. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

In *Forepaugh v. D. L. & W.* it was claimed that the law governing the contract was part of the commercial law, and that it was as competent for a Pennsylvania court to decide it as for a New York court. But the judge rejected the doctrine of a separate commercial law, severely criticising *Swift v. Tyson*. He cites a mass of authority on the point of conflict of laws entirely inconsistent with the distinction of the U. S. court. 2 Kent, Com. 458; Story, Conflict of Laws, § 38.

CONSTITUTIONAL LAW — LIBERTY — POLICE POWER. — Owners of factories and mines were prohibited by statute from paying their employees in orders on the stores of the company, and from selling goods from the stores to their employees at a greater profit than they obtained from strangers. *Held*, the statute was opposed to the Fourteenth Amendment of the United States and to the "life, liberty, and property" clause in the Bill of Rights of the Constitution of West Virginia, and could not be supported as an exercise of the police power. The court lay great stress on the fact that it does not apply to all employers, and is therefore class legislation. *State v. Goodwill*, 10 S. E. Rep. 285 (W. Va.); *State v. Fire Creek Coal & Coke Co.*, 10 S. E. Rep. 288 (W. Va.).

In Pennsylvania a similar statute was curiously declared "utterly unconstitutional and void." *Godcharles v. Wigeman*, 113 Pa. St. 431.

CONTRACTS — UNCONSCIONABLE CONTRACTS — MEASURE OF DAMAGES. — Plaintiff had contracted with the government to furnish "shucks" at sixty cents per pound. It appeared that shucks were worth only from twelve to thirty-five dollars per ton at the time of the contract; that it was customary to buy them by the hundred weight; and that the error occurred from a failure to strike out the words "pounds" on the printed form on which plaintiff's proposal was made, and to insert "hundred weight" instead, though plaintiff insists that there was no mistake on his part in making the bid. The "shucks" had been delivered to the government and used by it before the error was discovered. *Held*, that the contract could not be enforced, and that the plaintiff, though declaring on the special contract, could recover the market value only of the "shucks." *Hume v. United States*, 10 Sup. Ct. Rep. 134.

The court relies upon the two well-known cases of unreasonable contracts, *James v. Morgan*, 1 Lev. 111, and *Thornborough v. Whiteacre*, 2 Ld. Raym. 1164, and holds that when the contract is so extortionate and unconscionable on its face as to raise a presumption of fraud, that defence is available at law as well as by an application for affirmative relief in equity. And if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value.

CORPORATIONS—"TRUSTS."— A corporation was formed to manufacture and sell gas, and to purchase and hold or sell the capital stock of any gas company in Chicago, or elsewhere in Illinois. It was formed under the general incorporation law of the State, which permits corporations to "own . . . so much real and personal estate as shall be necessary for the transaction of their business, . . . and to . . . exercise powers necessary to carry into

effect the object for which they may be formed." *Held*, the main purpose of this company being to manufacture and sell gas, the purchase of stock in other companies is not necessary to carry this purpose into effect, and the general statute for incorporation not only does not expressly authorize such purchase, but impliedly forbids it. The charter is void as to all powers granted beyond the provisions of the statute.

Held, further, that the object of a corporation formed to "purchase, etc., shares of other gas companies, etc.," is not a "lawful purpose," because it tends to create a monopoly, and so it is not authorized under a statute providing for the formation of corporations for any "lawful purposes." *People ex rel. Peabody v. Chicago Gas Trust Co.*, 22 N. E. Rep. 798 (Ill.).

A note to this case collects the principal decisions on "trusts" recently made in this country, to which note may be added *Richardson v. Buhl et al.*, 43 N. W. Rep. 1102 (Mich.).

EQUITY JURISDICTION — NUISANCE — REASONABLE USE. — The defendants, keeping a hotel in London, had put up a stove, the heat of which rendered the cellar of the adjoining house unfit for storing wine. *Held*, that though the defendants were acting reasonably in the use of their house, yet as they caused serious annoyance and injury to the plaintiff, the court would interfere by injunction to protect the plaintiff, the jurisdiction of the court not depending upon the question of reasonable use. *Reinhardt v. Mentasti*, 42 Ch. D. 685 (Eng.).

EVIDENCE — PROCEEDINGS BEFORE MASTERS IN CHANCERY. — A bill for discovery and accounts was referred to a master. The accounts were complicated, and peculiarly within the knowledge of the defendant. Defendant refused assistance to the master, and produced only those books that he was compelled by order of court to produce. He now seeks to set aside the report by introducing books of which the master and parties to the suit had no knowledge. *Held*, that it was his duty to lay the books before the master, and, having neglected so to do, he could not now impeach the report. *Appeal of Ahl*, 18 Atl. Rep. 471 (Penn.).

GENERAL AVERAGE — JETTISON — RIGHT TO CONTRIBUTION. — A ship was stranded through the negligence of her master, and was thereby placed in a position of such danger as to make it necessary to jettison part of the cargo in order to save the remainder and the ship. *Held*, that innocent owners of the jettisoned cargo are entitled to general average, while the owners of the ship would not be, unless their ordinary relations to the shippers had been varied by contract. The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrong-doers whose acts have led to the jettison, or to those who are legally responsible for them. *Strang, Steel & Co. v. A. Scott & Co.*, 14 App. Cas. 601 (Privy Council).

The Privy Council here denies the correctness of the rule as stated in 1 *Parsons on Shipping*, 211, and in 2 *Parsons on Marine Insurance*, 285, which they consider not supported by the cases there cited. The fact that the loser has his remedy against the master for his negligence does not oust the right to general average. This right exists whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

INSURANCE — CONDITIONS OF POLICY. — A policy of insurance, stipulating that it should be void in case the assured was not the sole and unconditional owner in fee simple of the land on which the insured building stood, is valid, though the assured has but an equitable interest, being in possession under a contract of purchase from the owner in fee. *Dupreau v. Hibernia Ins. Co.*, 43 N. W. Rep. 585 (Mich.).

MANDAMUS — COMPELLING R. R. CO. TO FURNISH STATIONS. — A mandamus will be granted to compel a railroad company to establish a station at a town containing 1,800 inhabitants, which desires to send freight and passengers over defendant's line, and at present is three miles from any station. Railroad companies have a broad discretion in locating their stations, but this discretion must be exercised in good faith, and with a due regard to the necessities and convenience of the public. *People v. Chicago & A. R. Co.*, 22 N. E. Rep. 857 (Ill.).

PARTNERSHIP — WHO ARE PARTNERS? — Defendants agreed with a third person that they would indorse his notes for a certain amount, to be used in carrying on a store. Defendants were to have an interest in the goods in the

store to the amount of their indorsement, and a share of the net profits, and if the venture proved a loss, a sufficient amount of goods were to be turned over to them to secure them on their indorsement. *Held*, the defendants, having a proprietary interest in the business and its profits, were liable as partners. *McGovern et al. v. Mattison et al.*, 22 N. E. Rep. 398 (N. Y.).

SALES.—"As against third parties, a vendor of personal property must take actual possession, and such possession must be open, notorious, and unequivocal, such as to apprise those accustomed to deal with the vendor that the goods have changed hands." *Herr v. Denver Milling Co.*, 22 Pac. Rep. 770 (Col.).

STATUTE OF LIMITATIONS—NUISANCE.—Where a railroad company constructs its road-bed so that at times an overflow of adjoining lands is caused, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the particular overflowing of which complaint is made. *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 12 S. W. Rep. 331 (Ark.).

TRUSTS—INVESTMENT OF TRUST FUNDS.—A trustee, having no directions as to the mode of investing trust funds, cannot invest them in personal securities. *Simmons v. Oliver et al.*, 43 N. W. Rep. 561 (Wis.).

TRUSTS—VENDOR OF LAND—DOWER.—Complainant was in possession of land under a contract to convey. After the contract was made the vendor married. He died intestate, and the complainant brings his bill for specific performance. *Held*, that the intestate was constructive trustee at the time of his marriage, and his wife got no dower in the land. *Hunkins v. Hunkins*, 18 Atl. Rep. 655 (N. H.).

WILLS—TESTAMENTARY CAPACITY—BURDEN OF PROOF.—The jury were charged, in substance, that the burden of sustaining the will rested on him who asserted its validity, and unless he showed by the burden of proof that the testator was of sound mind and memory at the time of executing the will, they must find for the opponents. *Held*, error, as imposing a higher degree of proof on him who set up the will than the law required. *Pendlay et al. v. Eaton et al.*, 22 N. E. Rep. 853 (Ill.).

The decision of the court only went to the extent of saying, that, under the circumstances of the case, the charge was misleading. But from the general tenor of the opinion it would seem that the court thought, after evidence of a proper execution was introduced, the burden of proof for the whole case was on those opposing the will. That is, the court confound the "burden of proof" with the duty of "going forward with evidence." For the better view see *Sutton v. Sadler*, 3 C. B. N. s. 87-89; *Barnes v. Barnes*, 66 Me. 286; *Crowninshield v. Crowninshield*, 2 Gray, 524. See, however, *contra*, *McCoon v. Allen*, 17 Atl. Rep. 820 (N. J.), digested in 3 Harv. L. Rev. 188.

REVIEW.

THE LAW OF LIBEL, in its Relation to the Press. By Hugh Frazer, M.A., LL.M., etc. London: Reeves & Turner, 1889. pp. xix, 135.

This little book, a practical handbook on the law of newspaper libel is primarily designed, as the preface tells us, to meet the needs of those connected with the press. The law is stated in propositions numbered as articles,—a favorite arrangement among recent English legal writers and a few Americans,—while amplifications, limitations, and illustrations follow the articles in the shape of notes. The English authorities cited are numerous, the English statutes are carefully noticed throughout the text and conveniently collected in the appendix.

The work shows every mark of care; the articles are clear, condensed, and thorough. The notes and citations show learning and industry. The book cannot fail to be handy and serviceable, because it is brief, and yet apparently complete; and it will undoubtedly prove valuable to journalists, and so accomplish fully the design of the author.

L. F. H.

HARVARD LAW REVIEW.

VOL. III.

MARCH 15, 1890.

NO. 8.

THE DISSEISIN OF CHATTELS.

III.¹

INALIENABILITY OF CHOSSES IN ACTION.

THE rule that a *choses* in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainder-man his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res* or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.

A right of action for the recovery of land or chattels, or of a debt which, like land or chattels, was regarded as a specific *res*, did, indeed, descend to one's representative in the case of death. But this was hardly a departure from the rule, since the represen-

¹ The writer has discovered a further illustration, which should be added to those given in a preceding number of this REVIEW, in support of the principle that a wrongful possessor acquires title whenever the injured owner's right of action is barred. If a disseisee levied a fine, nothing passed to the conusee, but the fine barred the conusor's right. The disseisor, therefore, gained an absolute title. 2 Prest. Abs. 206.

tative was looked upon as a continuation of the *persona* of the deceased.¹

There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a *chose* in action. So, too, a reversion or a remainder was transferable by fine in the king's court,² or by a customary devise, which, when recorded in the local court, operated like a fine.³ Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced by a transferee. If, for instance, one granted an annuity to A. and his assigns, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A. and his assigns, the assignee was allowed to bring an action in his own name against the grantor,⁴ covenantor,⁵ and warrantor,⁶ respectively.

The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that

¹ The ancient appeals of battery, mayhem, imprisonment, robbery, and larceny were actions for vengeance, and from their strictly personal character naturally died with the party injured. Trespass for a personal injury, and *de bonis asportatis*, and *quare clausum fregit*, being for the recovery of damages only, also came within the maxim *actio personalis moritur cum persona*. By St. 4 Edw. III., c. 7, an executor was allowed to recover damages for goods taken from the testator by a trespass. And such has been the elasticity of this statute that under it actions for a conversion, for a false return, for infringement of a trademark, for slander of title, for deceit,—in short, actions for any tort whose immediate effect is an injury to or a diminution of another's property, have been held to survive. But not actions for torts which directly affect the person or reputation, and only indirectly cause a loss of property. In the United States the argument that a wrong-doer ought not to profit by the death of his victim, has led to legislation greatly increasing the actions that survive.

² Attornment was necessary before the conusee could distrain or bring an action against the tenant for services or rent. But the tenant could be compelled to attorn by the writs *Quid juris clamat*, and *Per quæ servitia*. 2 Nich. Britt. 46-48.

³ Y. B. 19 H. VI. 24-47; Co. Lit. 322 a.

⁴ 1 Nich. Britt. 269-270; Maund's Case, 7 Rep. 28 b; Co. Lit. 144, Butler's note[236]; Scott v. Lunt, 7 Pet. 596.

⁵ (1233) 2 Bract. Note Book, pl. 804; Y. B. 21 Edw. I. 137; Old Nat. Br., Rast. L. Tr. 67; Fitz. Nat. Br. 145.

⁶ (1233) 2 Bract. Note Book, pl. 804; Bract. f. 37 b, 381 b, 390, 391; 1 Nich. Britt. 255-256; (1285) Fitz. Ab. Carr. 93. These citations from Bracton are hardly reconcilable with the interpretation which Mr. Justice Holmes has given in "The Common Law" (pp. 373-4) of an obscure and possibly corrupt passage in Bracton, f. 17 b. In view of Professor Brunner's investigations (*Zeitschrift f. d. gesamte Handelsrecht*, Vol. 22, p. 59, and Vol. 23, p. 225), the distinguished judge would doubtless be among the first to correct his remark on p. 374: "By mentioning assigns the first grantor did not offer a covenant to any person who would thereafter purchase the land."

this rule had its origin in the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits"¹ shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence.² The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.

A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say, a *chose* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated,³ cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may, of course, be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or, without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action,⁴ and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment.

When the substitution of duties is by consent, the consent may

¹ *Lampet's Case*, 10 Rep. 48 a.

² "But in regard to *choses* in action, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another." 2 Spence, Eq. Jur. 850. See also Pollock, *Contracts* (5 ed.) 206; Holmes, *Common Law*, 340-341; Maitland, 2 L. Q. Rev. 495.

³ *Supra*, 315.

⁴ In general, whatever would survive to an executor passes to the assignee of a bankrupt.

be given either after the duty arises or contemporaneously with its creation. In the former case the substitution is known as a novation, unless the duty relates to land in the possession of a tenant, in which case it is called an attornment. A consent contemporaneous with the creation of the duty is given whenever an obligation is by its terms made to run in favor of the obligee and his assigns, as in the case of annuities, covenants, and warranties before mentioned, or to order or bearer, as in the case of bills and notes and other negotiable securities. Here, too, on the occasion of each successive transfer, there is a novation by virtue of the obligor's consent given in advance; the duty to the transferor is extinguished and a new duty is created in favor of the transferee.

The practice of attornment prevailed from time immemorial, but was confined to the transfer of reversions and remainders. Novation, although now a familiar doctrine, was, if we except the case of obligations running to the obligee and his assigns, altogether unknown before the days of *assumpsit* upon mutual promises.¹ The field for the substitution of duties by consent was therefore extremely limited, and in the great majority of cases a creditor would have found it impossible to give another the benefit of his claim had not the ingenuity of our ancestors devised another expedient, namely, the letter of attorney. By such a letter, the owner of a claim appointed the intended transferee as his attorney, with power to enforce the claim in the appointor's name, but to retain whatever he might recover for his own benefit. In this way the practical advantage of a transfer was secured without any sacrifice of the principle of the inalienability of *choses* in action.²

¹ The *rationale* of this doctrine is as follows: The so-called assignee of a claim is in reality an attorney with a power to sue for his own use. Being thus *dominus* of the *chase* in action, he enters into a bilateral contract with the obligor, promising the latter never to enforce his claim in return for the obligor's promise to pay him what is due thereon. This promise of perpetual forbearance operates as an equitable release of the old claim, and also as a consideration for the obligor's new promise.

² In 1 Lilly's Ab. 125, it is said: "A statute merchant or staple, or bond, etc., can not be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R." See also *Deering v. Carrington*, 1 Lilly, Ab. 124; *Shep. Touchst.* (6 ed.) 240; 2 Blackst. Com. 442; *Leake, Cont.* (2 ed.) 1183; *Gerard v. Laws*, L. R. 2 C. P. 308, 309, per Willes, J. These letters of attorney for the attorney's own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiq-

Indeed, so effectual was the power of attorney as a transfer, that, during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferrer. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the fifteenth century, if not earlier, till near the close of the seventeenth century.¹

The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property.²

By statute, in many jurisdictions, the assignee may even sue in his own name. But it is important to bear in mind that the assignee under the statute still proceeds in a certain sense as the representative of the assignor. The statute of itself works no novation. It introduces only a change of procedure.³ A release by the assignor to the debtor, ignorant of the assignment, extinguishes all liability of the debtor to any one.

uity. (1309) Riley, Memorials of London, 68. "Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person." See also West, Symbol. § 521.

¹ Y. B. 9 H. VI. 64-17; Y. B. 34 H. VI. 30-15; Y. B. 37 H. VI. 13-3; Y. B. 15 H. VII 2-3; *Penson v. Hickbed* (1588), 4 Leon. 99, Cro. Eliz. 170; *South v. March* (1590), 3 Leon. 234; *Harvey v. Bateman* (1600), Noy. 52; *Barrow v. Gray* (1600), Cro. Eliz. 551; *Loder v. Chesleyn* (1665), 1 Sid. 212; *Note* (1667-1772), Freem. C. C. 145. See also Pollock, Cont. (5 ed.) 701; 1 Harv. L. Rev. 6, n. 2.

The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of *choses* in action, and the notion became current that no contracts were assignable, not even covenants or policies of insurance and the like, although expressly payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants. Warranties being obviously not open to the objection of maintenance continued assignable, and so did annuities, although not without question. Perkins, Convey. § 101.

² Formerly an express power of attorney was indispensable (*Mallory v. Lane*, Cro. Jac. 342), the notion of an implied power being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise. 2 Harv. L. Rev. 52, 58. To-day, of course, the power will be implied from circumstantial evidence.

³ Accordingly an assignment in New York, where, by statute, actions must be brought by the real party in interest, will not enable the assignee to sue in Massachusetts, where the old rule that an assignee must sue in the assignor's name still prevails. *Leach v. Greene*, 116 Mass. 534; *Glenn v. Busey*, 5 Mack. 733. If the statute truly effected a change of title, the assignee, like the indorsee of a bill, could sue in his own name anywhere.

So, if the assignor should wrongfully make a second assignment, and the second assignee should collect the debt, he would keep the money, and the first assignee would get nothing.¹

We are now in a position to consider upon principle to what extent and in what mode a disseisee's interest in land or chattels may be transferred. The disseisee, by reason of the disseisor's tort, has a right to recover the *res* from the latter by self-redress or by action. This relation between the two, as we have seen, cannot be specifically transferred to another. There is, of course, no question of novation in such a case. But the mode of transfer which proved so effectual in the case of rights *ex contractu*, is equally applicable to claims arising *ex delicto*. The disseisee has only to constitute the intended grantee his attorney with power to recover the land or chattel, and to keep for his own benefit the *res* when recovered. There is an instance of such a grant as old as the time of Richard I.: "*G. filius G. ponit loco suo J. versus Gil. . . . de placito XL. acrarum terræ in H. ad lucrandum vel perdendum et* CONCEDIT EI TOTUM JUS SUUM *quod habet in predicta terra.*"²

¹ The assignee of an equitable *chase* in action, *e.g.*, a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable incumbrance. *Newman v. Newman*, 28 Ch. D. 674. So, if a *cestui que trust* should assign his trust first to A. and then to B., and B. should, in good faith, obtain a conveyance of the legal title from the trustee, he could hold it against A. What is true of the equitable trust is equally true of the analogous legal bailment. By judicial legislation the purchaser from a bailor is allowed to proceed in his own name against the bailee. But a bailee who, for value and in ignorance of the bailor's sale of his interest, receives a release from the latter, may keep the chattel; and if a bailor should sell his interest successively to A. and B., and B. should obtain possession from the bailee, A. could not recover the chattel from B. Upon principle and by the old precedents the bailor's interest is no more transferable than that of a creditor. Y. B. 22 Ed. IV. 10-29; *Wood v. Foster*, 1 Leon. 42, 43, pl. 54; *Marvyn v. Lyds*, Dy. 90 b, pl. 6; 2 Blackst. Com. 452. As late as 1844, that great master of the common law, Mr. Baron Parke, ruled that a purchaser from a pledgor could not maintain an action in his own name against the pledgee. The court *in banc* reversed this ruling. *Franklin v. Neate*, 13 M. & W. 481. The innovation has been followed in this country. *Carpenter v. Hale*, 8 Gray, 157; *Hubbard v. Bliss*, 12 All. 590; *Meyers v. Briggs*, 11 R. I. 180.

² (1134) 1 Rot. Cur. Reg. 42, cited by Brunner, 1 Zeitschrift für Vergleichende Rechtswissenschaft, 367. See also "A Boke of Presidents," fol. 86, b: "Noveritis me P. loco meo posuisse T. meum verum et legitimum attornatum ad prosequendum . . . vice et nomine meo pro omnibus illis terris . . . vocatis W. . . . quæ mihi . . . descendebant et quæ in presenti a me injuste detinentur. Necnon in dictas terras . . . vice et nomine meo ad intrandum ac plenam . . . possessionem et seisinam

The doctrine of maintenance which so long hampered the assignment of contractual rights proved an even more persistent obstacle to the transfer of rights to recover land or chattels. Indeed, in the case of land it was an insuperable obstacle in England until 1845; for up to that time the Statute 32 Henry VIII. c. 16, expressly nullified all grants by one disseised. In this country, however, the right of the grantee of a disseisee to bring a real action in the name of his grantor has, during the present century, been generally recognized.¹

It is believed that in England, at the present day, one who is dispossessed of his chattels may so far transfer his interest as to enable the assignee to bring an action to recover the chattel or its value in the name of the assignor. But no decision has been found upon the point. In the United States the right of the transferee to sue in the transferror's name,² or, in jurisdictions where the real party in interest must be plaintiff, in his own name,³ would be universally conceded.

We have thus far assumed that the dispossessed owner has nothing to transfer but a right of action or recaption; that when he is called owner, nothing more is meant than that he has the chief one of the two elements of perfect ownership, namely, the right of possession, and is, therefore, potentially owner. This assumption is conceived to be well founded, and is supported by abundant authority.⁴ There are, however, a few decisions and *dicta* to the

. . . capiendum . . . et super hujusmodi possessione sic capta et habita dictas terras . . . AD USUM DICTI T. custodiendum gubernandum occupandum et ministrandum."

¹ *Steeple v. Downing*, 60 Ind. 478; *Vail v. Lindsay*, 67 Ind. 528; *Wade v. Lindsey* 6 Met. 407; *Cleveland v. Flagg*, 4 Cush. 76; *Farnum v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140; *Rawson v. Putnam*, 128 Mass. 552, 553; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Betsy v. Torrance*, 34 Miss. 132; *Hamilton v. Wright*, 37 N. Y. 502; *Wilson v. Nance*, 11 Humph. 189, 191; *Edwards v. Roys*, 18 Vt. 473; *University v. Joslyn*, 21 Vt. 61; *Edwards v. Parkhurst*, 21 Vt. 472; *Park v. Pratt*, 38 Vt. 545.

² *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Holly v. Huggefords*, 8 Pick. 73; *Boynton v. Willard*, 10 Pick. 166; *Clark v. Wilson*, 103 Mass. 219, 222; *Jordan v. Gillen*, 44 N. H. 424; *North v. Turner*, 9 S. & R. 244.

³ *Lazard v. Wheeler*, 22 Cal. 139; *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Smith v. Kennett*, 18 Mo. 154; *Doering v. Kenamore*, 86 Mo. 588; *McKee v. Judd*, 12 N. Y. 622; *Robinson v. Weeks*, 6 How. Pr. 161; *Butler v. N. Y. Co.*, 22 Barb. 110; *McKeage v. Hanover Co.*, 81 N. Y. 38; *Birdsall v. Davenport*, 43 Hun, 552.

⁴ In addition to the early English authorities cited *supra*, pp. 34-35, see *Scott v. McAlpine*, 6 Up. Can. C. P. 302; *Murphy v. Dunham*, 38 Fed. Rep. 503, 506; *Goodwyn*

contrary.¹ These adverse opinions all go back to a *dictum* of Mr. Justice Story: "I know of no principle of law that establishes that a sale of personal goods is valid because they are not in the possession of the rightful owner, but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title to every person, not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against the wrong-doer."² Had this unfortunate *dictum* proceeded from a less distinguished source, it probably would not have had its present following. It may be said of it that it involves a *petitio principii*, assuming without proof, and in contradiction of all precedent, that the dispossessed owner really has something more than a right of action. What this something is has never been defined, and, it is submitted, for the reason that non-existent things are incapable of definition.

Let us test this *dictum*, however, by some of its practical consequences. We will suppose that after the sale the converter, in ignorance thereof, makes full compensation to the vendor for the conversion, and receives from him a release. Will it be maintained that the converter cannot hold the chattel against the vendee? And yet if the title passed to the vendee by the sale, that title cannot be affected by a subsequent release by one who has no title. Again, we may assume that the vendor wrongfully makes a second sale, and that the second vendee, being still in ignorance of the first sale, recovers the chattel or its value from the converter. Must the second vendee surrender what he recovers to the first vendee? Surely not. But he must if the *dictum*

v. Lloyd, 8 Port. 237; *Brown v. Lipscomb*, 9 Port. 472; *Dunklin v. Williams*, 5 Ala. 199; *Huddleston v. Huey*, 73 Ala. 215; *Foy v. Cochran* (Ala. 1889), 6 So. Rep. 685; *McGoon v. Ankeny*, 11 Ill. 558; *O'Keefe v. Kellogg*, 15 Ill. 347; *Taylor v. Turner*, 87 Ill. 296 (*seemingly*); *Ericson v. Lyon*, 26 Ill. Ap. 17; *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Young v. Ferguson*, 1 Litt. 298; *Davis v. Herndon*, 39 Miss. 484; *Warren v. St. Louis Co.*, 74 Mo. 521; *Doering v. Kenamore*, 86 Mo. 588; *Gardner v. Adams*, 12 Wend. 297; *Blount v. Mitchell*, 1 Tayl. (N. C.) 130; *Morgan v. Bradley*, 3 Hawks, 159; *Stedman v. Riddick*, 4 Hawks, 29; *Overton v. Williston*, 31 Pa. 155.

This note and the following are a revision of note 5, *supra*, p. 35.

¹ *Brig Sarah Ann*, 2 Sumn. 206, 211; *Tome v. Duhois*, 6 Wall. 548; *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; *Clark v. Wilson*, 103 Mass. 219, 222-3 (*seemingly*); *Dahill v. Booker*, 140 Mass. 308, 311 (*seemingly*); *Serfat v. Utica Co.*, 102 N. Y. 681 (*seemingly*); *Kimbro v. Hamilton*, 2 Swan, 190.

² *Brig Sarah Ann*, 2 Sumn. 206, 211.

under discussion is sound. Thirdly, if the title passed to the vendee, what becomes of the vendee's right of action? Surely he cannot recover the value of the chattel from the converter after he has sold it to another. But it may be urged he will be entitled to nominal damages only. Be it so. Suppose, then, that immediately after the sale the chattel is accidentally destroyed. The vendor will recover his nominal damages, the vendee will get nothing, and the converter will go practically scot free. It is possible to say, however, that the sale passes not only the title, but also the right to sue in the vendor's name for the conversion. But this hypothesis may work an injustice to the converter. If not sued for six years his title will be perfect. Suppose the sale to occur near the end of the period of limitation, and that the vendee can prove a conversion subsequent to the sale, as by a demand and refusal, the statute would run for another six years, which could not have happened in favor of the vendor if there had been no sale. In other words, the rule, *Nemo dare potest quod non habet*, would be violated.¹

All these unsatisfactory results are avoided by the adoption of the opposite view, supported alike by precedent and general reasoning, that a right of action is the sum and substance of the interest of a dispossessed owner of a chattel. On this theory the sale of the disseisee's right of action has the same operation as the assignment of a debt. The vendee stands in the place of the grantor, but does not displace him. He cannot accordingly extend the statute of limitations to the detriment of the converter. A release by the vendor for value to the converter who is ignorant of the sale, although wrongful, extinguishes all right to recover possession from the latter, and so makes him complete owner of the chattel. And, finally, a second purchaser from the dispossessed owner, who in good faith gets the chattel from the converter, may keep it. If, furthermore, statutes existed in all jurisdictions enabling the purchaser from a dispossessed owner of a chattel to sue for its recovery in his own name, there would be a complete harmony between the requirements of legal principle and commercial convenience.

In conclusion, then, the ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a

¹ See *Overton v. Williston*, 31 Pa. 155, 160.

rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

J. B. Ames.

CAMBRIDGE, 1890.

STATE JURISDICTION IN TIDE WATER.

THE debt which jurisprudence owes to passion is a heavy one. It is litigation which defines legal rules to greater precision ; and litigation most frequently originates in feelings entirely remote from a desire to assist the growth of law as an abstract science, or complete its efficiency as a working system. Among these feelings, a desire to get gain, even at a little risk, easily takes high rank. On the surface, for example, there is little connection between an abundance of menhaden in the summer of 1889 and questions of constitutional law. Such a connection became evident, however, in July, 1889, when steam seining vessels, attracted by the presence of menhaden in unusual numbers, began catching them by purse seines and steam appliances in waters geographically known as Buzzard's Bay — a narrow sheet of tide water in southeastern Massachusetts. These steamers hailed from Rhode Island, were duly enrolled, and had taken out the "United States fishing license," so called. July 19, 1889, certain of the Massachusetts district police, with local aid, in a little New Bedford tug-boat, boarded the "A. T. Serrell" and the "Seaconnet," two of these vessels then engaged in plying the fishing business at a point about a mile off Quisset Harbor, in the town of Falmouth, declared them seized, and afterwards arrested their crews as fishing in violation of chapter 192 of the Laws of 1886, "An Act for the protection of the Fisheries in Buzzard's Bay." This statute is substantially as follows :—

Section 1 provides that "No person shall draw, set, stretch or use any drag net, set net, or gill net, purse or sweep seine of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth nor in any harbor, cove or bight of said bay except as hereinafter provided." (These ex-

ceptions are set out in section 4, and are not material as to the conduct of these vessels.) Section 2 provides that "Any net or seine used in violation of any provision of this act, together with any boat, craft, or fishing apparatus employed in such illegal use, and all fish found therewith, shall be forfeited; and it shall be lawful for any inhabitant or inhabitants, of any town bordering on said bay, to seize and detain, not exceeding forty-eight hours, any net or seine found in use contrary to the provisions of this act, and any boat, craft, fishing apparatus, and fish found therewith, to the end that the same may be seized and libelled if need be by due process of law." By section 3, "All nets and seines in actual use set or stretched in the waters aforesaid in violation of this act, are declared to be common nuisances." By section 5, "Whoever violates any provision of this act or aids or assists in violating the same shall pay a fine not exceeding two hundred dollars for each offence." Except so far as modified by Stat. 1887, chap. 197, allowing the use of gill nets or set nets within one-half mile of the shores of the town of Mattapoisett (an amendment with no application to these vessels), the law was unrepealed. It may be stated here that the law of 1886 was itself a continuation and extension of similar laws existing for a period of about thirty years,¹ and was regarded as valuable to the section affected by it, and indirectly to the public generally, by protecting a natural spawning ground and breeding ground for fish in the warm, shallow waters of this indented bay, which, as a summer resort in growing favor, finds the preservation of its fisheries of very practical importance. The crews were taken under arrest to Barnstable, arraigned, released on bail, found guilty at a subsequent hearing before the local magistrate, fined \$100 each and appealed to the Superior Court, then to be holden in October. A libel for forfeiture was also filed against the steamers on behalf of the State, on information of the attorney general.²

Apparently relying upon the advice of counsel that the offence was not cognizable in the State courts (and perhaps influenced by the presence of the menhaden), the seiners returned to Buzzard's Bay, and as a consequence, on September 9, 1889, a party of State officers, under the guise of friendly fishermen ask-

¹ 1856, ch. 576; 1870, ch. 249; 1874, ch. 282.

² See *Hine v. Trevor*, 4 Wall. 555; *U. S. v. Ferry Co.*, 21 Fed. Rep. 331, 337; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 558.

apparently covering the whole subject-matter of the earlier act, and intended to remedy a mischief, either permitted or caused by it.¹

Now, both the Statute of 1865 and that of 1886 apply to the entire waters of Buzzard's Bay. The earlier act permits the use of a certain mechanical device for taking a certain fish in these waters. The later act forbids the use of certain mechanical devices, especially including the one permitted by the earlier law,² for catching all fish. On what line of reasoning can it be assumed that the Legislature intended these statutes to stand together? How can they? Is it on the theory that as the Act of 1886 says, "fish," while the earlier acts say³ "*fish of any kind*," that therefore menhaden, being fish of but little value in themselves, they and the appropriate device for catching them may be deemed excepted from the purpose of the later act, which apparently had for its object the preservation of food fish?

This construction might possibly overlook the fact that menhaden, if not food fish, are fish food, and that therefore catching menhaden might be expected to decrease food fish by removing that which attracts and supports them. It may, therefore, well have been that the destruction of menhaden was strictly within the mischief to be remedied by the Act of 1886. If so, the later act must clearly be taken as a repeal of the earlier one.

II. *The United States Fishing License.*

The defendant's claim that in granting a fishing license the Federal Government is supreme, is certainly correct, if it is meant that the Federal Government alone can issue such a license. They are issued under Title L. of the Revised Statutes, entitled, "Regulation of vessels in domestic commerce," secs. 4320 and 4321, and are issued under the familiar power of Congress:⁴ "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is tolerably plain what the Federal Government undertakes to do in issuing a fishing license, and that is, to state that certain custom-house regulations, necessary for the

¹ *Gorham v. Lockett*, 6 B. Mon. 146; *Com. v. Cooley*, 10 Pick. 37; *Goddard v. Boston*, 20 Pick. 407, 410; *Com. v. Flannelly*, 15 Gray, 195; *U. S. v. Barr*, 4 Sawyer, 254; *Park Commissioners v. Brenock*, 18 Ill. App. 559; *Parrott v. Stevens*, 37 Conn. 93; *Com. v. Kelliher*, 12 All. 480.

² *U. S. v. Irwin*, 5 McLean, 178; *U. S. v. Barr*, 4 Sawyer, 254.

³ 1856, ch. 176; 1870, ch. 249.

⁴ Const. U. S., art. I. sec. 8.

protection and encouragement of domestic commerce and the due collection of customs revenue, have been complied with. It completes the office of the enrollment as to a particular class of vessels. Does a vessel, when so licensed, become (as is claimed) a "chartered libertine," empowered, in the name of the United States, to break any State law, however salutary, relating to the coast fisheries? Massachusetts said "No," in the case of *Dunham v. Lamphere*,¹ decided in 1855. This was *qui tam* action brought by the plaintiff, as fishwarden of Nantucket, against the defendant, as the owner and master of a small fishing vessel, to recover a penalty imposed by Statute 1850, c. 6, which declared that after a certain day it should "not be lawful for any person to take any fish by seining within one mile from the shores of Nantucket, Tuckernuck, Smith's Muskeeket, and Gravel Islands." The defendant set up that he resided in Westerly, in the State of Rhode Island; that he came into Massachusetts, being licensed by the government of the United States, to pursue cod and other fishing; admitted taking fifty bass by seining within one mile of Gravel Island, in pursuance of this license, and in the honest belief that the Legislature of Massachusetts had no right to interfere with and deprive him of his rights acquired by such license. The language of the court is so appropriate as to warrant an extract. In speaking of this branch of the defendant's case, Shaw, C. J., says:—

The defendant contends that, by the enrollment of his vessel as a coasting and fishing vessel, he derives some peculiar privileges, and insists that he has been licensed to carry on the fisheries in these waters. It is quite true that his vessel has been enrolled under the laws of the United States, pursuant to the provisions of the act of Congress. The effect of this enrollment and license was, to give this vessel all the benefits and privileges of navigating the tide waters of the State, and such rights to bounty and other privileges as are given to fishing vessels by the laws of the United States; but it does not affect the present question.

In recurring to the defendant's answer, it will be perceived that he lays great stress upon the facts, that at the time of the alleged seining he was an inhabitant of another State, that he was master and part owner of a fishing vessel, enrolled in conformity with the laws of the United States, and he insists on this ground so earnestly, that it would seem that he and his legal advisers considered it the main ground of defence.

¹ 3 Gray, 268.

At first we were led, from this statement of defence, to suppose that this act, like some others which have been passed in this Commonwealth, contained provisions prohibiting or impeding the citizens and inhabitants of other States in the enjoyment of rights and privileges allowed to our own citizens. But upon recurring to the act, it is clear that there are no discriminating provisions in favor of the citizens of this Commonwealth, but that all the restraints and prohibitions of the statute operate in precisely the same manner on citizens of the Commonwealth and those of other States. We may fairly presume, therefore, that these enactments were all designed to preserve and improve the fishery, for the benefit of any and all persons entitled to enjoy the advantages of it. And surely those inhabitants of other States, who come within the territorial limits of this State, and thereby owe a temporary allegiance, and become amenable to its laws, have no just reason to complain, if, when within those limits, and enjoying benefits in common with our own citizens, they are bound to conform to a salutary law, necessary for the common good. It deprives them of no benefit or privilege which the constitution and laws of the United States could give, or do profess to give them,—that of a free navigation in and over all the navigable waters of the State.

The case does not consider the question of the maritime or admiralty jurisdiction of the United States, it being a point not raised. Neither was the jurisdiction of the court, sitting for the county of Nantucket, questioned, though the place was clearly not within the body of the county at common law, and the statute¹ had not then been enacted. There was no legislation giving the county of Nantucket special jurisdiction, unless the phrase "an action of debt, in any court of record proper to try the same,"² can be so considered. The court considers the *locus in quo* as within the "territorial limits" of Massachusetts, which are given³ as "a marine league, or three geographical miles, from the shore." Had the point of jurisdiction been raised, the court probably would have held that the Nantucket court had jurisdiction, by the effect of the act itself, and that boundaries of counties were coextensive with the limits of the Commonwealth, for all purposes not affected by the constitution and laws of the United States.⁴

¹ General Statutes, ch. 1, § 1.

² 1850, ch. 6, sec. 6.

³ 3 Gray, at 270.

⁴ *Com. v. Peters*, 12 Metc. 387; *Com. v. Alger*, 7 Cush. 53, 82; *Com. v. Roxbury*, 9 Gray, 451, 494; *Pollard v. Hagan*, 3 How. 212, 230.

The same conclusion as to the validity of a fishing license, to justify infraction of a State law relating to fish, was reached in the case of *Smith v. Maryland*.¹ A Maryland statute² provided that it should "be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same." The original defendant, plaintiff in error, being a citizen of Pennsylvania, was the owner of a sloop called the "Volant," which was regularly enrolled and *licensed* to be employed in the coasting trade and fisheries. This vessel was seized by the sheriff of Anne Arundel County, while engaged in dredging for oysters in the Chesapeake Bay, and was condemned to be forfeited to the State of Maryland. The forfeiture being sustained in the State courts, the defendant brought a writ of error to the Supreme Court of the United States. The Supreme Court, by Curtis, J., thus dispose of the question of the fishing license, expressly, however, it may be observed, declining to discuss the question as to whether the waters in which the acts were committed were within the territorial limits of Maryland, on the ground that this point was not before them: "It is the judgment of the court that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law." The judgment of the Maryland courts was affirmed with costs.

*Haney v. Compton*³ is to the same effect. The action was replevin. The plaintiffs charged the defendant with taking their schooner, the "Roda L. Loper," in the waters of Maurice River Cove, with her sails, anchors, and appurtenances. The defendant's avowries admitted the taking, and justified under the New Jersey statute relating to clams and oysters,⁴ providing that "it shall be unlawful for any person who is not at the time an actual inhabitant or resident of this State . . . to rake or gather clams, oysters, or

¹ 18 Howard, 71 (1855).

² 1833, ch. 254.

³ 36 New Jersey Law, 507.

⁴ Rev. Stat. M. J. p. 136.

shell-fish . . . in any of the . . . waters of this State, on board of any canoe, flat, scow, boat, or other vessel," and decreeing a penalty and forfeiture upon conviction. The defendant set up that this was a regulation of commerce, and abridged the privileges of citizens of the United States. On the matter of the license, the court say: "It cannot with any propriety be said that a statute which simply prohibits non-residents on board a vessel from subverting the soil of the State or carrying away her property, or that of her grantees, leaving such vessel to pass and repass, and go whithersoever those in charge of her desire, is a regulation of commerce with foreign nations or among the States. It is a law for the protection of property,—at most an internal police regulation entirely within the competency of the State to adopt, and it is not perceived that it can by possibility interfere with commerce in the sense in which that word is used in the Federal Constitution."

To the same effect is *McCreedy v. Virginia*, 94 U. S. 391.

Except so far as a distinction can be drawn between floating fish and shell-fish,—and none seems possible,—these four cases are to precisely the same effect.¹

The difficulty with the defendants' contention, that a fishing license gives the right to fish, as a matter of federal regulation, lies, as is pointed out in *Dunham v. Lamphere*,² in confusing the two great public rights in tide water,—fishing and navigation. It is easy to confuse them, for they have points of resemblance as well as those of difference. Of the two, navigation is paramount.³ It is public beyond question.⁴ It extends, when the tide is in, even over flats made private property.⁵ But it is a right *jure gentium*, particularly within the province of the national government, as representing the sovereignty of the entire country. It is not an incident of or attaching to any particular waters or the soil under them. Conceding to the utmost ownership

¹ *Packard v. Ryder*, 144 Mass. 440; *Com. v. Manimon*, 136 Mass. 406.

² 3 Gray, 268, 275.

³ *Post v. Munn*, 1 South. 61; *Colchester v. Brooke*, 7 Q. B. 339; *Cobb v. Bennett*, 75 Pa. St. 326; *Moulton v. Libbey*, 37 Me. 472; *Mason v. Mansfield*, 4 Cranch C. C. 580. But see *People's Ice Co. v. Excelsior*, 44 Mich. 229.

⁴ *Reg. v. Keyn*, 13 Cox C. C. 403, 419 (Sir R. Phillimore); *Com. v. Essex Co.*, 13 Gray, 239, 247; *Boston, etc. Steamboat Co. v. Munson*, 117 Mass. 34.

⁵ *Draper v. Curtis*, 1 Cush. 413; *Com. v. Alger*, 7 Cush. 53, 74; *Boston v. Lecraw*, 17 How. 433; *Deering v. Long Wharf*, 25 Me. 65; *Gerrish v. Union Wharf*, 26 Me. 392.

of soil or the most complete jurisdiction to the government owning adjacent shores, the free right of friendly navigation must be conceded to all comers. This was agreed by all the judges in the case of *Reg. v. Keyn*,¹—that whatever might be the jurisdiction of England over the waters within the three mile limit, in which the death occurred, the right of the German steamer to navigate there on an errand of friendly commerce was undoubted.² With this incident of the federal power of regulating commerce the fishing license deals. It gives all the power the Federal Government can give in the matter of local fisheries: it gives the right to go. But it by no means includes by necessary implication a right to fish when the licensed vessel gets there.

It is not doubted, indeed, that the State can regulate the navigation of its tidal waters, so far at least as not to conflict with the regulations of Congress.³ Upon the general rule that all tide waters are navigable, a limitation has even been suggested,—that the object of the navigation be useful to trade or agriculture.⁴ But the right of navigation for pleasure is held to be equally public.⁵ The early rules of the common law as to "navigable waters" do not always happily adjust themselves to the circumstances of a new country. As stated in *Com. v. Vincent*,⁶ the phrase "navigable waters," as commonly used in the law, has three distinct meanings: 1st, as synonymous with "tide waters," being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt;⁷ or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose;⁸ or, 3d (which has not prevailed in this Commonwealth), as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.⁹ But, as stated, the matter is particularly within the province of the Federal Government.¹⁰

¹ L. R. 2 Exch. Div. 63; 13 Cox C. C. 403. See also *Massé, Droit Commercial*, Bk. 2, tit. 2, chap. 7, art. 105.

² See *pass.* p. 370.

³ *Rowe v. Granite Bridge*, 21 Pick. 344; *Com. v. Alger*, 7 Cush. 53; *Atty.-Gen. v. Woods*, 108 Mass. 436; *Atty.-Gen. v. B. & L. R. R.*, 118 Mass. 345.

⁴ *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Murdock v. Stickney*, 8 Cush. 113; *Charlestown v. County Commissioners*, 3 Metc. 202.

⁵ *Att.-Gen. v. Woods*, 108 Mass. 436.

⁶ 108 Mass. 441, 447.

⁷ *Com. v. Chapin*, 5 Pick. 199; *Atty.-Gen. v. Woods*, 108 Mass. 436.

⁸ *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Murdock v. Stickney*, 8 Cush. 113, 115.

⁹ *Waters v. Lilley*, 4 Pick. 145, 147; *Genesee Chief v. Fitzhugh*, 12 How. 443; *The Daniel Ball*, 10 Wall. 557.

¹⁰ *Passenger Cases*, 7 How. 445; *Wheeling Bridge Case*, 13 How. 518; *Tonnage Cases*, 12 Wall. 204; *Welton v. Missouri*, 91 U. S. 275.

The right of fishing in the sea and other tide waters, like that of navigation, is public,¹ The rule applies also to shell-fish.²

Massachusetts herself, it so happens, has gone exceptionally far in recognizing this public right of fishing in tide waters. By the Colonial Ordinance of 1641-7,³ applying originally to the territory covered by the Massachusetts Bay Colony, but extended by judicial construction to Plymouth Colony,⁴ to Maine,⁵ and Martha's Vineyard,⁶ the ownership of the seashore⁷ and flats between high and low water marks to the distance of one hundred rods was given to the littoral proprietor, provided navigation⁸ is not impeded. By the common law of England, the ownership of the seashore to high-water mark was in the Crown, subject to the public right of fishing and, when the tide was in, navigation.⁹

After Magna Charta, even the Crown could not divest the seashore of this *jus publicum*; the grantee took the *jus privatum* of the seashore to low-water mark, subject to the public rights of navigation and fishing.¹⁰ Being, therefore, among the regalia or incidents of sovereignty, this trust for the protection of the public rights could not be aliened by royal grant. Nothing but an act of Parliament, exercising all the powers of dominion and sovereignty, could convey the sea bed discharged of this trust.¹¹

In derogation of this rule of the common law, the ordinance of

¹ Carter v. Murcot, 4 Burr. 2162; Warren v. Matthews, 1 Salk. 357; Blundell v. Catterall, 5 B. & Ald. 268; Wooley v. Campbell, 37 N. J. L. 163; Corfield v. Coryell 4 Wash. C. C. 371, 381; Weston v. Sampson, 8 Cush. 347; Com. v. Alger, 7 Cush. 53; Dunham v. Lamphere, 3 Gray. 268; Com. v. Peters, 12 Metc. 387; Proctor v. Wells, 103 Mass. 216; Arnold v. Mundy, 6 N. J. L. 1; Paul v. Hazleton, 37 N. J. L. 106; Moulton v. Libbey, 37 Me. 472.

² Bagott v. Orr, 2 Bos. & Pul. 472; Martin v. Waddell, 16 Peters, 414; Weston v. Sampson, 8 Cush. 347; Com. v. Manimon, 136 Mass. 456.

³ Anc. Charters (ed. of 1814), chap. 63, ss. 2, 3, 4; Com. v. Alger, 7 Cush. 53, 67.

⁴ Barker v. Bates, 13 Pick. 255, 258.

⁵ Storer v. Freeman, 6 Mass. 435; Codman v. Winslow, 10 Mass. 146; Lapish v. Bangor Bk., 8 Greenl. 45.

⁶ Mayhew v. Norton, 17 Pick. 357.

⁷ Sale v. Pratt, 19 Pick. 191, 197.

⁸ Drake v. Curtis, 1 Cush. 395, 413.

⁹ Hale, *De Jure Maris*, chap. 4; Coulson on Waters, p. 343; Hall on the Seashore, 42; Fitzwalter's Case, 1 Mod. 105; Warren v. Matthews, 6 Mod. 73; Orford v. Richardson, 4 T. R. 437; Crichton v. Collery, 19 W. R. 107; Blundell v. Catterall, 5 B. & Ald. 268; Malcomson v. O'Dea, 10 H. L. Cases, 593, 618; Middleton v. Sage, 8 Conn. 221.

¹⁰ Bracton, lib. I. chap. 12, sec. 6.

¹¹ Lowe v. Govett, 3 B. & Ald. 863; Rex v. Montague, 4 B. & C. 598; Atty-Gen. v. Burridge, 10 Price, 350. See Celsus, D. 43. 8, 3.

1641-7, as has been said, gives the ownership of the seashore to the owner of the upland, the object being the encouragement of commerce by permitting the erection of wharves, etc.¹ Yet even in this strong case, where the ownership is granted, under a power analogous to that of Parliament, to the individual for the express purpose of enclosures for wharves or agricultural cultivation, so persistently does the *jus publicum* of fishing inhere in the sea bed, that it is not ousted until the enclosure or conversion actually takes place. As said by Shaw, C. J.,² "For fishing and fowling persons may pass over another man's property, of course including these shores thus [by the ordinance] made private property; this restores the public right to pass on foot over flats or places over which the sea ebbs and flows, so long as they are not actually reclaimed and converted³ into tillage or mowing land." Until such enclosure or conversion, the public may freely dig clams or other shell-fish,⁴ though no more of the soil can be removed than naturally adheres to the surface of the living shell-fish.⁵ The public can also go on this seashore, with its qualified private ownership, landing from boats, and walk along the beach for the purpose of catching floating fish.⁶

The rule as to shell-fish obtains generally throughout the country.⁷ But outside of Maine and Massachusetts, it is an ordinary incident of the general right of fishing.⁸ In these States, the object of the Colonial Ordinance of 1641-7 is apparently attained by permitting the littoral proprietor to build out walls without regard to his title in the soil under the water, —always provided he does not obstruct navigation.⁹ The State owns the flats and sea bed beyond the one hundred rod limit of the Colonial

¹ *Com. v. Charlestown*, 1 Pick. 180, 183; *Storer v. Freeman*, 6 Mass. 435, 438; *Sparhawk v. Bullard*, 1 Metc. 95, 108; *Com. v. Alger*, 7 Cush. 53, 77, 94; *Com. v. Roxbury*, 9 Gray, 451, 515. But see *Walker v. Boston & Maine R.R.*, 3 Cush. 1, 24.

² *Com. v. Alger*, 7 Cush. 53, 68.

³ *Proctor v. Wells*, 103 Mass. 216; *Lakeman v. Burnham*, 7 Gray, 437; *Parker v. Cutler Mill Dam Co.*, 7 Shepl. 353; *Locke v. Motley*, 2 Gray, 265.

⁴ *Weston v. Sampson*, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437; *Proctor v. Wells*, 103 Mass. 216; *Com. v. Bailey*, 13 All. 541.

⁵ *Porter v. Shehan*, 7 Gray, 435; *Moore v. Griffin*, 22 Me. 350.

⁶ *Packard v. Ryder*, 144 Mass. 441.

⁷ *Peck v. Lockwood*, 5 Day, 22; *Paul v. Hazelton*, 37 N. J. L. 106; *Oyster Co. v. Baldwin*, 42 Conn. 255; *Prelle v. Brown*, 47 Me. 28.

⁸ *Church v. Meeker*, 34 Conn. 421.

⁹ *Simons v. French*, 25 Conn. 346; *Clement v. Burns*, 43 N. H. 609, 617, *Dutton v. Strong*, 1 Black, 23, 31, 32; *Gates v. Milwaukee*, 10 Wall. 497, 504.

Ordinance.¹ So, islands formed below low-water mark belong to the Commonwealth.²

But while the right of fishing in tide waters resembles that of navigation in that it is public, it differs from navigation in a very important particular which lies very near the root of this entire matter, viz., fishing is a right which is *attached to the soil as an incident of its ownership*. In other words, fish are a part of the national wealth. Whether, even before being reduced to possession, they are in strictness *property*, as considered by Vattel,³ or are *res nullius* until reduced to possession,⁴ fish or the right to reduce them to possession are part of the national domain.⁵ Wheaton⁶ says that "the right of fishing in the waters adjacent to the coast of any nation within its territorial limit belongs exclusively to the sovereigns of the State."⁷ Leaving the vexed question of "territorial limit" for subsequent examination, we are concerned with the municipal nature of the right to fish. It seems a natural corollary from the State's ownership.⁸ But this ownership is clearly of a peculiar and limited nature. The State holds as owner for the purposes of government, for the benefit of the governed; in other words, as a trustee for its citizens.⁹ With few exceptions, it is bound to recognize no one else. The common law of England from very early times recognized precisely this restricted ownership. By that law, the *jus privatum*, or ownership of the soil in the tide waters of the seashore or the sea bed, was in the king, as sovereign, and was a right susceptible of alienation.¹⁰ But the

¹ *Com. v. Pierce*, 2 Dane's Abr. ch. 68, art. 4, § 3; *Com. v. Crowninshield*, Sullivan, Land Titles, 286; *Mill Corporation v. Newman*, 12 Pick. 467, 476; *Com. v. Alger*, 7 Cush. 51, 92; *Com. v. Roxbury*, 9 Gray, 451, 497.

² *Hopkins Academy v. Dickinson*, 9 Cush. 544, 550; *Middletown v. Sage*, 8 Conn. 228.

³ Book I. §§ 234, 235.

⁴ Grotius, *De Jure Belli*, lib. 2, ch. 2, ss. 4, 5.

⁵ *Corfield v. Coryell*, 4 Wash. C. C. 371, 382; *Dunham v. Lamphere*, 3 Gray, 267.

⁶ Intern. Law, p. 258.

⁷ *Gammel v. Commrs.*, 3 Macq. 149; Schultes, *Aquatic Rights*, 3; Chitty, *Prerogative*, 100; Vattel, tit. 1, ch. 23; Puffendorf, IV. 4; VII. 8; Craig, *Jus. Feud. lib. I.* 15, § 13; Martens, *Précis du Droit*, § 153.

⁸ *Haney v. Compton*, 36 N. J. L. 507, 511; *Johnson v. Drummond*, 20 Gratt. (Va.) 419, 425; *Corfield v. Coryell*, 4 Wash. C. C. 371, 379.

⁹ See *Moore v. Sanford*, S. J. C. Mass. not yet reported.

¹⁰ *Weston v. Sampson*, 8 Cush. 347, 351; *Storer v. Freeman*, 6 Mass. 435; *Martin v. Waddell*, 16 Peters, 422; *State v. Sargent*, 45 Conn. 358, 372. See Selden, *Mare Clausum*, c. 22, 24; Bacon's Abr., tit. *Prerogative*, B.3; Hall on the Seashore, 13; Co. Litt.

king, or, in case of alienation, his grantee, held these lands subject to and in trust for the *jus publicum* of navigation and the fisheries.¹ This double right was apparently transferred to the colonies by the royal charters, which aliened to the grantees named therein not only the ownership of the soil, so far as relates to the *jus privatum*, but also the *jura regalia*, or prerogative rights of the Crown, to be held for the colonies as the Crown held them for the realm of England.² The State therefore holds both the right of the king and of Parliament.³ Or, as stated in *Lakeman v. Burnham*,⁴ "The people and settlers of the territory acquired not only the right of soil, but a right to the shores and arms of the sea, for all useful purposes of navigation and fishery."

Whether under these grants any elements of sovereignty other than that of allegiance remained in the Crown, as related to the soil of the colonies, including the seashore and lands under the sea, is of small importance; as these elements of sovereignty became vested in the respective colonies upon their being recognized as sovereign and independent States by the definitive treaty of Paris,⁵ by which His Britannic Majesty, "for himself, his heirs and successors," relinquished "all claim to the government, property, and territorial rights of the same in any part thereof."⁶ The ownership of the soil, including that under tide water, became absolute in the State,⁷ subject only to the same limitations as when held by the Crown; viz., that in whomever might be the *jus privatum* of the seashore or the sea bed, such owner held subject to the *jus publicum*, which, as stated, principally covered navigation and fisheries. It cannot be contended that, upon the formation of the Federal Government, the strict ownership of the State in the sea-

107 a, 260 a; 4 Inst. 60; 2 Roll. Abr. 169, 170; Staunford's Abr.; Life of Sir Leoline Jenkins, vol. 2, p. 732; Justice's Sea Laws, art. 1.

¹ *Com. v. Alger*, 7 Cush. 53, 90; Hale *De Jure Maris*, chap. 6; *Dunham v. Lamphere*, 3 Gray, 268; *Clement v. Burns*, 43 N. H. 609, 616.

² *Dill v. Wareham*, 7 Metc. 438; *Com. v. Alger*, 7 Cush. 53; *Gough v. Bell*, 21 N. J. L. 156; *Brown v. Kennedy*, 5 Harris & J. 195; *Martin v. Waddell*, 16 Peters, 367; *Com. v. Roxbury*, 9 Gray, 451, 481; *Boston v. Richardson*, 105 Mass. 351, 356; *People v. Ferry Co.*, 68 N. Y. 71.

³ *Nichols v. Boston*, 98 Mass. 39.

⁴ 7 Gray, 437.

⁵ Sept. 3, 1783.

⁶ *Dunham v. Lamphere*, 3 Gray, 268; *New Orleans v. United States*, 10 Peters, 662; *Pollard v. Hagan*, 3 How. 212.

⁷ *Corfield v. Coryell*, 4 Wash. 371, 385; *Bennett v. Bugge*, 1 Bald. 60, 72; *Pollard v. Hagan*, 3 How. 312; *Gough v. Bell*, 1 Zab. 156; *Weston v. Sampson*, 8 Cush. 347.

shore and sea bed, *i. e.*, the *jus privatum*, was transferred to the general government. Whatever the territorial limits of the original maritime States may have been at the time of the formation of the Federal Union, it is clear that no part of their territory passed to the Union then formed. The powers of the Federal Government were not those of ownership: they are those of sovereignty; of jurisdiction, rather than of territorial dominion.¹

Whatever, therefore, may be the federal rights in the public domain or undivided lands, the United States in the original colonies owns only such places as have been ceded.² This disposes of the question of the *jus privatum*. But the further question is readily suggested: Has the control of the *jus publicum* in tide waters been ceded to the national government so far as relates to the fisheries? No specific grant of such a power is found in the Constitution. The nearest approach, so far as interstate relations are concerned, is apparently the power to regulate commerce. This brings with it, within certain limitations, the right to regulate navigation. The peculiar propriety of this delegation of power has been referred to. But fish are *feræ naturæ*; until caught they are not objects of commerce, and when caught become the property of the captor, not substantially differing from other property.³

While, therefore, the right of navigation, being within the scope of the regulation of commerce, and a right *jure gentium*, is naturally ceded to the national government; the right of fishing, being a right concerning a portion of the property attached to the State domain, part of the common wealth, is a matter purely of municipal regulation. Not only, therefore, in the absence of any specific grant, does it not pertain to the general government,⁴ but there are strong *a priori* reasons why it would be unusual that it should. The matter is so settled by authority. It has been decided in Massachusetts⁵ and in the United States courts⁶ that the right to regulate the fisheries within their territorial limits belongs to the

¹ *Martin v. Waddell*, 16 Peters, 367.

² *Pollard's Lessee v. Hagan*, 3 How. 212; *Munford v. Wardwell*, 6 Wall. 423, 436; *Weber v. Harbor Commrs.*, 18 Wall. 57, 66.

³ *Corfield v. Coryell*, 4 Wash. C. C. 371, 380; *McCready v. Virginia*, 94 U. S. 391.

⁴ *Corfield v. Coryell*, 4 Wash. C. C. 371.

⁵ *Dunham v. Lamphere*, 3 Gray, 268; *Com. v. Alger*, 7 Cush. 53, 82. See also 2 Dane's Abr. ch. 68, art. 2; *Gough v. Bell*, 1 Zab. 156; 2 C. 2 Zab. 441.

⁶ *Smith v. Maryland*, 18 How. 74; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. 60, 72; *McCready v. Virginia*, 94 U. S. 391.

several States as an incident of ownership,¹ and was not transferred to the general government.²

The practical interpretation which the legislation of the maritime States has placed upon the question of the regulation of tide fisheries within their territorial limits, is to the same effect.³ Much legislation, it may be noted, confines the benefits of the fisheries to citizens of a particular State. For example, New Jersey limits the benefits of her oyster fisheries to her own citizens. And such legislation is valid,⁴ even in view of the provisions of the Constitution,⁵ declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."⁶ So of Massachusetts.⁷

The right of the State to regulate tidal fisheries has even been so far extended in Massachusetts as to apply beyond the limits of tide influence to the control of the migratory food fish,—herring, alewives, salmon, and shad,—which, frequenting tide waters during certain seasons of the year, return to their spawning grounds—usually large fresh-water ponds—through non-tidal streams or rivers connecting with the sea.⁸ The State regulates these in various ways; *e. g.*, by compelling the erection of fish ways in dams erected across the streams,⁹ or by absolutely forbidding any taking of the same during their passage. And it has even been held that although in a non tidal stream the riparian proprietor owns to the thread of the stream, and has the exclusive right of fishing in the waters adjoining his premises,¹⁰ such riparian right of fishing may be forbidden by the Legislature, with no necessity

¹ Vattel, Bk. 1 § 246.

² *Cooley v. Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713; *Com. v. Alger*, 7 Cush. 53, 81; *New Orleans v. U. S.*, 10 Peters, 662, 737; *Pollard v. Hagan*, 3 How. 212; *State v. Medbury*, 3 R. I. 138.

³ *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Hettrick v. Page*, 82 N. C. 65; *Bickell v. Polk*, 5 Harr. 325.

⁴ *Paul v. Hazelton*, 8 Vroom, 106; *Morley v. Campbell*, 8 Vroom, 166; *Canal Co. v. R. R. Co.*, 1 C. E. Green, 366; *State v. Medbury*, 3 R. I. 138; *Oyster Co. v. McGarvey*, 12 R. I. 385; *Corfield v. Coryell*, 4 Wash. C. C. 371, 380.

⁵ Art. 4 § 2.

⁶ *Dunham v. Lamphere*, 3 Gray, 267, 276.

⁷ Stat. 1886, chap. 299; *Dunham v. Lamphere*, 3 Gray, 267, 275.

⁸ *Dane's Abr.* ch. 68, art. 6, § 1.

⁹ *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 89; *Com. v. Essex Co.*, 13 Gray, 239, 248; *Commrs. v. Holyoke Water Power Co.* 104 Mass. 446.

¹⁰ *Waters v. Lilly*, 4 Pick. 145; *Vinton v. Welsh*, 9 Pick. 89; *McFarlin v. Essex Co.* 10 Cush. 304, 309; *Commrs. v. Holyoke Co.*, 104 Mass. 446, 456.

of rendering compensation, even under a statute which requires a town taking such a stream "to pay all damages" ¹

Contrariwise, the Massachusetts Legislature has assumed to regulate the public right of fishing in tidal waters by restricting as well as extending its exercise. For the purpose of encouraging the cultivation of useful fishes in salt-water, the owner of land bordering upon a tidal stream which . . . "on the average throughout the year . . . has a channel less than forty feet wide and four feet deep during the three hours nearest the hour of high tide," ² has the exclusive right to fish on his own premises ³ and within a certain distance around the mouth of the stream. ⁴ It may be observed that much of the benefit to the cultivation of useful fishes possible under those laws is nullified by a decision of the Supreme Court in the case of *Eastham v. Anderson*, ⁵ limiting the application of these sections to cases where the fish are *actually enclosed*. Just how the court expected that trout, which spawn on gravel in the upper waters of a stream, and annually frequent tide waters beyond its mouth, can successfully be cultivated by a riparian tidal proprietor in an enclosure anywhere on the stream, remains unsolved by followers of "the gentle craft."

The Legislature, it has been held, may even destroy the public fishery in tide waters. ⁶ In fact, without following this legislation into further detail, it may be said that it would be difficult, in view of the almost yearly legislation as to tidal fisheries, their seasons, means of capture, etc., to find a subject of legislative control more carefully and minutely regulated than these same fisheries. Such legislation is too voluminous and persistent to require or justify extended citation.

It may be summed up by saying that the statement of Denman, J., ⁷ — "the preservation of the spawn, fry, or brood of fish has been for centuries a favorite subject of legislation," — is equally true of this country. ⁸

¹ *Cole v. Eastham*, 133 Mass. 65.

² Pub. Stats., chap. 91, § 28.

³ Pub. Stats., chap. 91, §§ 27, 31.

⁴ *Nickerson v. Brackett*, 10 Mass. 212; *Cleveland v. Norton*, 6 Cush. 380; *Russell v. Russell*, 15 Gray, 159.

⁵ 119 Mass. 526.

⁶ *Howes v. Grush*, 131 Mass. 207.

⁷ *Mayor of Maldon v. Woolvet*, 12 A. & E. 13.

⁸ See *Anc. Charters*, 114, 254.

Under this course of legislation much money has been invested in these fisheries; large sums are yearly paid out in the form of wages, while the investments of money more indirectly affected by this legislation, *e. g.*, hotel and seashore property, are still larger in amount. If the matter is not one of municipal legislation, it is late to discover it. The fact that the State frequently employs town agencies through which more conveniently to give its citizens the benefit of the State ownership of the seashore or sea bed, in oyster licenses, weir permits, etc., does not hide the fact that the ownership and regulation of tide waters and their fisheries is vested solely in the State, — who makes use of these agencies simply for its own purposes. Towns have no corporate ownership of the public fisheries within their limits.¹ Nor does their jurisdiction for certain purposes imply ownership.² Town officers and county commissioners cannot lay out highways over tide waters.³ It may be concluded, therefore, that, from the State's point of view, the fisheries are subject to State regulation.

The correctness of this view is rather confirmed by the fact that Congress has as yet not undertaken to make any regulation of those fisheries within the State territorial limits. The nearest approach to such a regulation is probably an act approved Feb. 28, 1887,⁴ by which the importation into the United States of mackerel, other than Spanish mackerel, caught in the spawning season, *i. e.*, from March 1 to June 1, is prohibited for five years from March 1, 1888. By a special proviso, the act does not apply to "mackerel caught with hook and line from boats, and landed in said boats, or in traps and weirs connected with the shore." The object of this law is obvious. It does not purport to regulate the State fisheries, which are apparently expressly excluded; but it is a regulation of commerce, and prevents the importation of certain articles of food at a time regarded as prejudicial to the public interest. The commercial nature is, perhaps, further shown in the fact that the effect of the act is added as a condition

¹ 2 Dane's Abr. ch. 68, art. 4, §§ 6 *et seq.*; *Dill v. Wareham*, 7 Metc. 446; *Coolidge v. Williams*, 4 Mass. 140, 144; *Randolph v. Braintree*, 4 Mass. 315; *Rowe v. Smith*, 48 Conn. 444; *Spear v. Robinson*, 29 Me. 531.

² *Com. v. Roxbury*, 9 Gray, 451, 494.

³ *Austin v. Carter*, 1 Mass. 231; *Com. v. Coombs*, 2 Mass. 489; *Arundell v. McCullogh*, 10 Mass. 70; *Charlestown v. Commrs.*, 3 Metc. 202; *Kean v. Stetson*, 5 Pick. 92; *Marblehead v. Co. Commrs.*, 5 Gray, 451; *Com. v. Roxbury*, 9 Gray, 451, 494.

⁴ *Stats. at Large*, vol. 24, p. 434.

of the "fishing license" granted under Rev. Stats. U. S., sec. 4321, which we have seen to be a commercial regulation.

But the defence in the Manchester case, while possibly admitting that there has been no such direct regulation by Congress of the fisheries in State territorial limits, or in limits claimed by a State, still contend that the United States has asserted its right to control these fisheries by virtue of another constitutional power, viz., the treaty-making power of the executive. It is said that in the reciprocity treaties with Great Britain of 1854, abrogated in 1866, and in that of 1871, also since abrogated, the United States agreed, as one of the high contracting parties, "that British subjects shall have, in common with citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern coasts and shores of the United States north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coast and shores of the United States and of the said islands, without being restricted to any distance from the shore."

It is easier to admit the truth of this than to see its application. These treaties have ceased to be operative. Nor is it quite evident how the fact that a Canadian could, during a certain period of the past, have fished in certain waters "in common with" Massachusetts citizens, *i. e.*, to the same extent that they could, tends to show that an American citizen from Rhode Island can fish, after that time, in a manner that a Massachusetts man could not. Possibly the argument is that the treaty-making power, being applied to local fisheries, is predicated upon a general right to control them, and probably, as a second step, that the control is exercised in granting a "fishing license." The conclusion does not follow. The precise limits of the treaty-making power *quoad* State rights are not quite definitely fixed. But it seems clear that the States may well have delegated to the general government, who can alone represent them with foreign nations, the power of disposing of certain State privileges to those nations for what may be deemed sufficient equivalents. The general government, in this aspect of the matter, acts as the agent of the State, and may well barter away, in treaty with a foreign nation, rights of the State, which it is well agreed, as between the general and the State sovereignty, belong to the State. It is, therefore, by no means clear that because the President has affected to give British subjects certain

rights of participation in the State fisheries, that therefore the Federal Government either has the right to control the State fisheries, or indeed claims to have it.

III. *The offence was not committed in Massachusetts.*

The fishing being done, as is agreed, within a mile and a quarter of the Falmouth shore, at a place inside headlands less than two marine leagues apart, but more than one (from "Westport in the county of Bristol on the one side, and the island of Cuttyhunk in the county of Dukes County on the other side"),¹ so far apart that objects cannot be readily discerned from headland to headland, it is contended that this is not an offence committed within the jurisdiction of Massachusetts, and therefore not triable in its courts. No contention is made but that if the case is triable in a Massachusetts court, the venue is properly laid in the county of Barnstable.² Reliance in this connection is placed by the defendant upon the provision of the Federal Constitution,³ that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." The contention is, that at the time of the adoption of the Federal Constitution, by English law, which was the law of the colonies, the boundary between the common law and the admiralty jurisdiction as regards the open sea was the water line;⁴ that, so far as regards the seashore opposite the open sea, the state of the tide determined the jurisdiction, — when the tide was out, the common-law jurisdiction attaching, when the tide was in, the admiralty.⁵ That upon the adoption of the Federal Constitution this admiralty and maritime jurisdiction was entirely ceded to the general government, leaving nothing of admiralty jurisdiction in the maritime States. That this admiralty and maritime jurisdiction thus vested in the general government is not less ample, and in some respects more ample, than the admiralty jurisdiction of England, above stated.⁶

¹ Report, p. 1.

² Pub. Stats., chap. 1, sec. 1; chap. 22, sec. 1; chap. 27, sec. 2.

³ Art. 3, sec. 2.

⁴ 1 Steph. Comm. 114; 1 Kent, Comm. 366.

⁵ Constable's Case, 5 Co. 107, 110; 1 Kent, Comm. 367; U.S. v. Grush, 5 Mason, 290; Story, Const. § 1673; The Admiralty, 12 Co. 79, 80; Reg. v. Tallow, 2 Hagg. 294; The Pauline, 2 C. Rob. 358; Embleton v. Brown, 3 E. & E. 234; Reg. v. Musson, 8 E. & B. 900; Rex. v. Brandy, 3 Hagg. 257; Lopez v. Andrew, 3 M. & K. 329.

⁶ De Lovio, v. Boit, 2 Gal. 471; Waring v. Clark, 5 How. 458; Genesee Chief v. Fitzhugh, 12 How. 443; The Lottawanna, 21 Wall. 558; The Daniel Ball, 10 Wall. 557.

And that this jurisdiction is exclusive.¹ (But see *Chase v. Steamboat Co.*,² to the effect that prior to the Union the county courts had concurrent jurisdiction within a marine league from the shore with the courts of admiralty, and that this concurrent jurisdiction still remains.) The result is reached that the Commonwealth of Massachusetts can have no jurisdiction over the offence committed below low-water mark, within the exclusive, cognizance of the United States admiralty and maritime jurisdiction, it being conceded that this jurisdiction applies to crimes committed on the high seas, and not within the body of any county.³

Apparently the difficulty with the contention is this : The grant of exclusive admiralty and maritime jurisdiction which the original maritime States of the Union clearly possessed upon the declaration of the Treaty of Paris and before the adoption of the Federal Constitution, from these States to the national government, like other similar grants, gave Congress power to assume this jurisdiction by appropriate legislation, and left the admiralty and maritime jurisdiction in the States, so far as not assumed by Congress.⁴ So it is not to be doubted but that Congress can assume jurisdiction over all offences committed on tide water to the full extent of the English admiralty jurisdiction.⁵ Has Congress done so? The Crimes Act of the United States⁶ provides, in section, 5339, for the punishment of crimes committed on "the high seas or in any arm of the sea, or in any river, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, *and out of the jurisdiction of any particular State.*" The final words of this section, which was originally passed in 1790, are important, as showing the limit of the admiralty jurisdiction assumed by the United States. Whatever is within the State's jurisdiction is not within the admiralty jurisdiction of the general government. Congress has seen fit to limit itself as beginning where the State jurisdiction leaves off.⁷ What, then, is the State's jurisdiction over

¹ 1 Kent, Comm. 397 ; U. S. v. Grush, 5 Mason, 290 ; Com. v. Peters, 12 Metc. 387.

² 9 R. I. 419.

³ 2 Brown's Civil Law and Admr. 263, 274 ; 1 Kent, Comm. 360, 363 ; Martin v. Hunter's Lessee, 1 Wheat. 304, 335 ; U. S. v. Wiltberger, 5 Wheat. 76, 108, n.

⁴ Corfield v. Coryell, 4 Wash. 371, 384 ; Com. v. Peters, 12 Metc. 387 ; Sherlock v. Alling, 93 U. S. 99, 104 ; Reynolds v. The Favorite, 10 Minn. 242 ; Bohannon v. Hammond, 42 Cal. 227.

⁵ Com. v. Peters, 12 Metc. 387, 393 ; U. S. v. Bevans, 3 Wheat. 336, 386. But see *Chase Adm. v. Steamboat Co.*, 9 R. I. 419.

⁶ Lib. LXX. chap. 3.

⁷ U. S. v. Bevans, 3 Wheat. 336 ; U. S. v. Grush, 5 Mason, 290.

tide waters? Clearly its jurisdiction extends over its "territorial limits," and these are now to be determined. As we have seen, the fisheries are controlled by the State as an incident of the ownership within these limits; they are equally, in this connection, the bounds of its general jurisdiction. What, therefore, is the territory under tide water of a maritime State of the Union? Apparently, within a certain maximum, it is precisely what the State elects to claim. The ownership of the sea bed of the open waters opposite its coasts on the part of the State is by virtue of its general ownership of all unappropriated property.¹ The land under the sea adjoining any maritime State of this Union belongs to no one.² The national government can exercise, indeed, certain rights of jurisdiction; but none of its powers are such as to conflict with a State's right to appropriate such portion of the sea bed adjoining its coast as it may think to be for the benefit of its citizens.³ Usually, such land has no value. But should a State desire to reclaim a portion of the sea bed and make it part of its tillage land; should mines extend under the ocean in their workings; should it seem desirable to tunnel for any purpose for any distance under tide water, there seems no reasonable doubt that such appropriation would carry ownership of the land so taken.⁴ Certainly such a claim on the part of the Legislature would be binding upon domestic tribunals, and it is not perceived how it would conflict with any federal power. Indeed, the possession of some maritime frontier in the shape of adjacent waters, even in the open sea, is necessary for the safety and dignity of every sovereign people.⁵ It is conceived that the State is sovereign in this connection, and that the sea frontier of the nation is that of the several States.

If it be objected that, as States may vary in their claims of submarine territory, the general government would be placed in the anomalous position of representing, as to foreign nations, a country

¹ Vattel, Bk. I. ch. 22, ss. 2, 66; *Corfield v. Coryell*, 4 Wash. 371, 386; *Steam Engine Co. v. Steamship Co.*, 12 R. I. 348, 357; 2 Dane's Abr. ch. 68, art. 2; *Atty.-Gen. v. Chambers*, 4 De G., M. & G. 206.

² Inst. Lib. 2, tit. 1, §§ 1, 2, 5; Dig. Lib. 43, tit. 12-14; 2 Domat, Civil Law, Vol. I. tit. 8, § 1.

³ *Reg. v. Keyn*, 13 Cox, Cr. Cases, 403, 514.

⁴ Inst. II. 1, § 18; Dig. 41, 1, § 7; 1 Twiss, Bracton, 68; *Howe v. Stowell*, Alcock & Nap. 348, 358.

⁵ Vattel, *Droit des Gens*, § 288 Manning, *Law of Nations*, 119.

with a frontier of different width, the answer would seem to be that such considerations cannot affect the question of the State or national jurisdiction over fisheries, and that Congress can readily avert any practical difficulties of the nature suggested, by simply enlarging its assumption of admiralty and maritime jurisdiction.

There is, as has been said, a limitation upon the just claim of a State to ownership in, or jurisdiction over, tide water. That limitation seems to consist in the power of effectual appropriation. *Jure gentium*, a State owns all the waters that it can control from the shore. In other words, its claim must be effectual, or potentially so. Any claim under this, by the sovereign, is unchallenged in any quarter.

The earlier claims of jurisdiction over tide waters were without this, or, indeed, any particular limitation. Selden, in his "*Mare Clausum*,"¹ claimed for Great Britain control of the four seas surrounding England and around the islands to any extent to which her cannon could clear the seas. This carried ownership of the *fundus maris* to the king. The Court of King's Bench claimed jurisdiction of offences on the narrow seas.² Sir Matthew Hale claimed the narrow sea as "part of the waste and demesnes and dominions of the King of England."³

Sir Leoline Jenkins, in 1683, as Judge of Admiralty, *temp.* Charles II., claimed a protectorate of the whole world for England, admitting in certain waters a concurrent jurisdiction in the adjacent country.

The continental jurists who have handled the question vary between wide limits. Selden's claim of jurisdiction for England in surrounding waters has been followed by other writers, though the extent varies greatly.

Albericus Gentilis gives a jurisdiction to the State of one hundred miles; Casaregis,⁴ as late as 1740, gives substantially the same limit. Baldus and Bodinus say sixty miles. Puffendorf cites this limit with approval. Loccenius⁵ puts it at two day's sail. Valin allows the state⁶ all the surrounding waters that can be fathomed

¹ Lib. 1, ch. 26.

² 25 Edw. I. (A.D. 1297); *Beufo v. Holtham*, Selden's notes to Fortescue, c. 32; *Norman Master, etc.*, Fitz. Ab., Corone, 216; 13 Co. 53; 2 Hale, P. C. 12, 13.

³ Hargrave's Law Tracts, 10, 31, 32, 41, 43.

⁴ *Discursus de Commercio*, sec. 136.

⁵ *De Jure Maritimo*, ch. 4, sec. 6.

⁶ *Commentary on French Ordinances*, ch. 5.

by a lead line. Lampredi, writing as late as 1778,¹ limits the state only by its necessity or its idea of its own convenience. Rayvenal² makes the horizon the limit.

It is obvious that these wide claims, however gratifying to the vanity of maritime countries, — especially England, — were unsatisfactory as a working theory, and some more definite rule was needed. This was furnished by Grotius, who states a principle of limitation, — the distance over which compulsion can be exercised from the land, — "*quatenus ex terrâ cogi possunt.*"³ Bynkershoek, in 1702, gives the same rule as Grotius, and suggests also the method of the compulsion, — the portage of cannon, — "*quousque tormenta exploduntur.*"⁴ Ortolan⁵ indorses Bynkershoek's rule, and gives the range of the "*tormenta*" as three miles, — "*Depuis l'invention des armes à feu cette distance a ordinairement été considérée comme de trois milles.*" Marten gives the three-mile limit as a minimum of the valid claim of the State to what Hautefeuille calls "territorial waters;"⁶ Schultes,⁷ Azuni,⁸ Klüber,⁹ Fiore,¹⁰ adopt the three mile limit, as being the carriage of cannon.

The American text-writers are in accord.¹¹ The "marine league" has been accepted by eminent judges in both countries.¹² English text-writers, it may be observed, persistently have clung to the broad claim of the "*Mare Clausum.*" The "three-mile limit" was evolved by continental writers, to whom the motto "*potestas*

¹ Public, Jur. Theor., Vol. II. p. 65.

² Institutions, L. 2, ch. 9, § 10.

³ Lib. II, cap. 2, sec. 13.

⁴ De Dominio Maris, 2, p. 257.

⁵ De la Mer Territoriale, ch. viii.

⁶ Des Droits et Devoirs des Nations Neutres.

⁷ Ch. ii. p. 144.

⁸ Droit Maritime, etc., Vol. I. p. 252, sec. 14.

⁹ Droit des Gens, pt. II. tit. II. § 130.

¹⁰ Vol. I. p. 370 (1865). See also Pando, Elem. del Der. Int. 155; Heineccius, lib. 2. c. 3. § 12; Ortolan, Diplom. de la Mer, Vol. I. bk. 2. c. 8; 1 Phill. Int. Law, c. 4, § 154; c. 8, § 196; Manning's Law of Nations, 118, 119; The Annapolis, Lush. Adm. 295; The Saxonla, 15 Moore, P. C. 262; Church v. Hubbard, 2 Cranch, 187; U. S. v. Smiley, 6 Saw. 640.

¹¹ Halleck, ch. vi. § 13; 1 Kent, Comm. 26-31; Bishop, Comm. Crim. Law, Bk. IV. chap. 5, § 74; Gould on Waters, §§ 13, 16; Wheat chap. 4, sec. 10; Story, Conf. Laws, sec. 529.

¹² Maria, 1 C. Rob. 352; Twee Gebroeders, 3 C. Rob. 162; The Leda, Swa. 40; Colliery Co. v. Schurmanns, J. & H. 180; Brig Ann, 1 Gall. 62.

finitur ubi finitur armorum vis" was a very acceptable solution of a vexed question.¹

The nature and source of the State's right in the surrounding sea has also been much in controversy with the continental jurists. Wolff, in his "*Jus Gentium*:" published in 1749, speaks of the surrounding water as "territory:" "*Quoniam partes maris occupatæ* [the idea of appropriation] *ad territorium illius gentis pertinent qua eas occupavit quale jus Rector civitatis in suo territorio habet, tale etiam ipsi competit in partibus maris occupatis.*" Heubner, writing in 1759, calls this sea an "accessory;"² Puffendorf³ uses the same phrase; Moser,⁴ in 1778, says it is under the sovereignty of the adjacent land, so far as a cannon shot will reach. Ortolan speaks of the right as one of jurisdiction, "*Lois de police et de sûreté*," and not of ownership (*propriété*). Calvo⁵ takes the same ground. The better doctrine seems, however, to be that of Vattel, — that the sovereign can take the sea bed as unappropriated land, — "*s'empare de certaines parties de la mer*,"⁶ "*s'empare d'un pays qui n'appartient encore à personne*;"⁷ and that this ownership carries jurisdiction with it, — "*l'empire aussi bien que le domaine.*"⁸

The question was discussed in many of its bearings in the celebrated case of *Regina v. Keyn*,⁹ equally noted perhaps for the eminence of the counsel, the exhaustive learning of the judges, and the wide diversity of their opinions. The facts are familiar. February 17, 1876, a collision took place in the English Channel, off Dover, one mile and nine-tenths of a mile from Dover pier, and within two and a half miles from Dover Beach, between the English steamer "Strathclyde" and the German steamer "Franconia," both being engaged in friendly commercial voyages. A hole was pierced in the hull of the "Strathclyde," which soon sank, and many lives were lost. The "Franconia" made no attempt to render assistance, but steamed away without lowering its boats into

¹ See 1 Blackstone's Comm. 110; Chitty, Prerogative, 142, 173, 206; 1 Bacon, Abr. 640; Co. Litt. 107.

² De la Saisie des Bâtimens Neutres, ch. 1 §§ 128-132.

³ De Jure Naturæ et Gentium, lib. IV. ch. 2, § 8.

⁴ Versuch des Neuesten Europäischen Völkerrechts, vol. V. p. 486.

⁵ Droit International, lib. V. §§ 199, 201.

⁶ Bk. I. ch. 23, § 295.

⁷ Bk. I. ch. 18, § 205.

⁸ Bk. II, sec. 84.

⁹ L. R. 2 Ex. D. 63; 13 Cox C. C. 403.

the water. The excuse of the German captain was that he supposed his own vessel to have been badly injured ; and that the English pilot on board, who was not then in charge, but had been a short time before, having been sent to ascertain the extent of the damage, returned and cried out, " For God's sake ! put the helm a-port, and run to the shore ; I think our ship is going to sink too." Cross-actions of collision between the two vessels were tried about the 1st of May, 1876, in the admiralty division of the High Court of Justice, before Sir Robert Phillimore and two elder brethren of the Trinity House, by whom the "*Franconia*" was adjudged wholly to blame. An appeal to this judgment was dismissed by the admiralty judges. Meantime, Ferdinand Keyn, the German captain, was arrested at Dover for manslaughter by negligence. He was tried at Old Bailey in April, according to the course of the common law, in the Central Criminal Court, before Pollock, B., and a jury, and found guilty. The jurisdiction of the court was a question reserved to the Court for Crown Cases Reserved. The Central Criminal Court by statute¹ has power to hear and determine offences " committed on the high seas and other places within the jurisdiction of the admiralty of England." The leading counsel for the defendant was the celebrated and, in many respects, remarkable Judah P. Benjamin, Q.C. The case was twice argued. The Court for Crown Cases Reserved, by a bare majority (Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore, seven judges), *held* that there was no jurisdiction in the English court to try the offence. A strong minority of six (Lord Coleridge, C. J., Brett, J. A., Amphlett, J. A., Grove, J., Denman, J., and Lindley, J.) dissented, on the ground that the offence, being committed within three miles of the English coast, was within the criminal jurisdiction of the English admiralty courts. All the judges agreed that county lines extended only to low-water mark. It was also agreed that if the offence had been murder, the offence, being committed on a British ship, would have been amenable to English law.² And all the judges conceded that had any statute extended the jurisdiction of the English courts of admiralty to the limit of three miles, such a statute would have been binding upon the courts of England, and authorized a conviction of the defendant.

¹ 4 & 5 Will. IV. c. 36.

² *Rex. v. Coomes*, 1 Leach C. C. 388.

This decision, the correctness of which has not been generally conceded,¹ resulted in the removal of any danger of a recurrence of the difficulty by the passing of an act of Parliament² which extended the jurisdiction of England to the limit of a marine league from low-water mark, carefully regulating the operation of the act in the interests of diplomacy.

Applying these rules to the case at bar, in the absence of any special statute, it would be doubtful whether the crime could be considered as committed *intra fauces terræ*. Under the old rules of the common law, waters *intra fauces terræ* were those lying inside headlands so close that objects could reasonably be discerned across by the naked eye.³ Such lands were within the body of the county, and offences therein committed were cognizable by the courts of common law.⁴ Apparently such a claim would be impossible in this case.⁵ It is contended that the offence not being within the body of the county at common law, cannot be made within the county by any other authority. But the rule of the common law based itself simply upon the State's claim as it then was. What prevents the state from making other and larger claims within the limits of effectual appropriation?⁶ But the fact itself is, however, less important in that the offence clearly was committed within a mile and a quarter of the shore; that is, within the three-mile limit, if this is to be considered the open sea. In *Dunham v. Lamphere*⁷ the common-law rule, in Massachusetts, is stated as a marine league from shore, and from a line drawn between headlands "so narrow that objects can be distinguished across by the naked eye."⁸

In *Chase, Adm's v. Steamboat Co.*,⁹ the court say that "before

¹ See speech of Lord Cairns, reported Halleck, *Int. Law* (Baker's ed.), 559; *Blackpool Pier v. Fylde*, 46 L. J. M. 189.

² 41 & 42 Vict. c. 73.

³ *The Eleanor*, 6 Rob. Adm. 39; *The Public Opinion*, 2 Hagg. Adm. 398; *The Harriet*, 1 Story, 251; *U. S. v. New Bedford Bridge*, 1 Wood & M. 401, 483; *People v. Supervisors*, 73 N. Y. 393, 396; *Com. v. Peters*, 12 Metc. 387; *U. S. v. Grush*, 5 Mason 290.

⁴ *The Fame*, 3 Mass. 147; *Cable Co. v. Telegraph Co.*, 2 App. Cases, 394, 419; *Ina Co. v. Dunham*, 11 Wall. 17.

⁵ But see *Reg. v. Cunningham*, Bell C. C. 86.

⁶ Hall, *Int. Law*, 127; 1 Fiore, *Int. Law*, 373.

⁷ 3 Gray, 268.

⁸ *Com. v. Peters*, 12 Metc. 387.

⁹ 9 R. I. 419; s. c. 16 Wall. 522.

the adoption of the Constitution the State had jurisdiction over the bay and over the coast of the sea to the extent of a marine league."

But the matter has been expressly settled by statute. On the adoption of General Statutes,¹ in 1860, the following statute was enacted: "The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or an arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line." This statute was reenacted in 1882, in Public Stats., chap. 1, sec. 1.²

Whether the necessity for making this claim arose from certain difficulties by which the court were oppressed in deciding the case of *Com. v. Peters*,³ though they express none, or was suggested, as stated by Dwight Foster, Esq.,⁴ by the *Nisi Prius* ruling of Allen, J., in Barnstable County, in November, 1859, where an indictment was tried for kidnapping a fugitive slave transferred from a Pensacola brig, in which he was concealed, to another to take him back to Florida, off Hyannis, below low-water mark, but less than three miles from shore, is not perhaps of consequence. As *Com. v. Peters* was decided in 1847, it could hardly have been the immediate cause of a statute passed twelve years later. It suffices, however, for the present purpose, that the State has advanced this claim. Such a claim is binding upon the domestic tribunal, and opposed, it is believed, to no law, national or international. Were the claim much more extravagant, still, as said by Cockburn, C. J., in *Reg. v. Keyn*,⁵ "That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country, leaving the question of its consistency with international law to be determined between the governments of the respective nations, can, of course, admit of no doubt."

¹ Chap. 1 sect. 1.

² See Gen. Stats. R. I. c. 1. sects. 1 and 2; Const. California, art. 12; *Mahler v. Transportation Co.*, 35 N. Y. 352, 360; Const. Alabama, art. 2, sect. 1; *Galveston v. Meard*, 23 Tex. 349; *The Peterhoff*, 5 Wall. 28, 51.

³ 12 Metc. 387.

⁴ 11 Am. Law. Rev. 625.

⁵ 13 Cox, Cr. C. 403. See also remarks of Coleridge, C. J., at p. 480. See also *Butler v. Steamship Co.*, 130 U. S. 527; Heffter, Pub. Int. Law, § 75; Bluntschli, *Das Moderne Völkerrecht*, §§ 307, 309.

Exactly what was deemed necessary in the case of *Regina v. Keyn* has been done by Massachusetts to vest a jurisdiction in her State courts to try an offence against her laws committed on open tide waters within her territorial limits. It would seem as if the result would follow that inside these limits she can protect her fisheries against all intruders.

Charles F. Chamberlayne.

Boston, March 4, 1890.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE \$2 50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

GEORGE P. FURBER,	<i>Editor-in-Chief.</i>
WILFRED BOLSTER,	GUY CUNNINGHAM,
HERBERT H. DARLING,	CHARLES I. GIDDINGS,
CHARLES HUDSON, <i>Treasurer,</i>	LOUIS F. HYDE,
EDGAR J. RICH,	ARTHUR C. ROUNDS,
PHILIP S. RUST,	HENRY SCHOFIELD,
CHARLES E. SHATTUCK,	AARON C. THAYER,
EZRA R. THAYER.	

ATTENTION is called to the twentieth annual report of Professor Langdell as dean of the Law School, submitted to the President of the University and recently published in the "Annual Reports of the President and Treasurer of Harvard College, 1888-89." Beginning at page 111 of the book, the report exhibits the work of the School during the year. Then follow tables, showing the attendance during the last nineteen years; the division of the students into classes for the last twelve years, or since the three years' course was established; the result of admission examinations, and of examinations for degrees since 1877-8, or since the establishment of the three years' course and of admission examinations; the number of students receiving the honor degree since its establishment ten years ago,— a total number of seventy-seven; and finally the number of students who have been examined for a degree during the past twelve years in the studies of any year without having been members of the School during that year. The remainder of the report is concerned with the number of entries during the last nineteen years, the sources from which the students come, their age, and a discussion of the elements and causes of increase and change in the number and grade of the students in the last three years. The "Reports of the President and Treasurer of Harvard College" will be sent regularly to any graduate of Harvard College who sends notice of his desire to receive them, and presumably the Report for 1888-89 would be sent to any one else who has interest enough in the University to ask the Secretary of the University for one.

THE cases of *R. v. Brown*¹ and *People v. Moran*,² decided within a few days of each other last November, are worth comparing. In the former case the Court for Crown Cases Reserved in England flatly disapproved of the doctrine of certain earlier cases³ that an effort to commit a crime under circumstances in which the crime could never be completed — *e. g.*, trying to pick an empty pocket — does not constitute a criminal attempt. The remark of the court in *R. v. Brown*

¹ 18 W. R. 95.

² *R. v. McPherson*, Dears. & B. C. C. 197, and *R. v. Collins*, 9 Cox. C. C. 497.

³ 7 N. Y. Supp. 482.

was, however, made without any discussion of the point, and was apparently not necessary to the decision. In *People v. Moran* on the other hand, a majority of the Supreme Court of New York, First Department, adopted the view of the early English cases in opposition to what has been sometimes called the "American" doctrine,¹ resting their decision on common-law principles, as well as on grounds connected with the New York statutes, and supporting their conclusion by strong arguments.

WE hope that something will speedily be done to relieve the overcrowded docket of our Supreme Court. Partisanship has hitherto prevented it; for, although the necessity has long been apparent, neither side has been willing to place at the disposal of its opponents a large number of important judicial appointments which a reform would probably make necessary; but now that the executive and the legislative departments are in the hands of one party, there is reason to expect that something may at last be accomplished.

As is to be expected, there is much difference of opinion as to the best method of attaining the desired result. Some propose to go at once to the source of the trouble, and, by restricting the jurisdiction of the federal courts, to decrease the volume of the ever-increasing stream of litigation which threatens to overwhelm them. Others propose that the court sit *in banc* longer, or sit in divisions, so that more cases may be heard; but the former plan is inadequate, and the latter, although it would doubtless give relief, is strongly opposed by the justices, and there is little chance of its adoption. A much more satisfactory solution is offered by the Jackson Bill, the principal features of which were reproduced in a bill favorably reported in a recent Congress. By the provisions of this, all the original jurisdiction now exercised by the Circuit Courts is to be transferred to the District Courts, and each Circuit Court with two additional judges is to form an intermediate court of appeal. The right of appeal from these courts will be restricted so that the Supreme Court will not, for many years at least, be overcrowded. Not the least of the merits of this plan is its simplicity, and yet it embodies not only the relief of the Supreme Court, but a very decided improvement in the whole system of the lower courts. Probably Congress will adopt the main features of this plan when it considers the matter.

THE Supreme Court of Nebraska has recently decided, in the case of *Pullman Palace Car Co. v. Lowe*,² that a sleeping-car company must be held to the liability of an innkeeper for articles stolen from its passengers. This decision is an interesting addition to the discussion of the status of sleeping-car companies, especially in view of the unanimity with which the courts, on reasoning not always convincing, have heretofore reached the opposite conclusion whenever the point has arisen. These decisions are collected by Mr. Morris Gray, author of *Gray on Communication by Telegraph*, in an able and interesting article in 20 *American Law Review*, 159, which disapproves of them, and earnestly contends that a sleeping car should be regarded as an inn.

¹ See *Com. v. McDonald*, 5 Cush. 365, and *People v. Jones* 46 Mich. 441.

² 44 N. W. Rep. 226 (Dec., 1889).

The writer draws a strong argument from public policy; indeed, so far as the reason for the original liability of the innkeeper is to be found in the unprotected condition of the guest in a mediæval inn, the position of a modern sleeping-car passenger suggests an obvious analogy.

IN *Pullman Palace Car Co. v. Lowe* the plaintiff on entering the car handed his overcoat, the article afterwards stolen, to the porter, who put it in the vacant upper berth of the plaintiff's section. The court calls attention in its decision to the fact that the coat was thus placed "in the care of the company's employes;" but this fact, except so far as it shows that the coat was *infra hospitium*, does not seem to be material to the decision or to the reasoning by which the court reaches it. It appears also that the district court had found as a conclusion of law that the company was negligent. The Supreme Court, however, does not refer to this, putting its decision on the broader ground, and it may be observed that the findings of fact appear hardly to justify the inference of negligence. The opinion deals with the suggestion that the sleeping car is to be likened to a lodging house, and with other objections to the theory that it is an inn, and comes to the conclusion that the services rendered by the company are essentially similar to those of an innkeeper. It is singular that in so important a case none of the cases which have reached the opposite result are mentioned.

It may be admitted that the supporters of the view of *Pullman Palace Car Co. v. Lowe* have successfully answered most of the arguments of their opponents and shown that the sleeping-car company is within the spirit of the rule as to the innkeeper's liability. The further question perhaps remains whether that liability — which has been said by a distinguished authority¹ not to "stand on mere reason, but on custom, growing out of a state of society no longer existing" — should not, in view of its nature and origin,² be narrowly construed and strictly applied rather than receive any liberal interpretation. It is worth observing (though Mr. Gray in his article distinguishes this case from that of a sleeping-car) that the courts refuse to hold a steamboat company liable as an innkeeper for property stolen from the state-room of a passenger.

IN the course of a most interesting and instructive address on the "Law as a Profession," recently delivered in Cambridge, the Hon. Jeremiah Smith dwelt at some length upon the moral aspects of his subject, and among other things (unless we entirely misunderstood him) stated it to be his opinion that a lawyer was not justified in advocating a cause which he believed to be morally unjust, even although it was clearly "sound" on the existing law. This is very high moral ground, and there is, doubtless, much to be said in support of it. Perhaps the harsh and cynical opinions regarding the profession held by many intelligent laymen can only be removed by the practice of a particularly high code of morals in the profession. Nevertheless we doubt whether the opinion expressed by Judge Smith is theoretically the correct one. In a very proper sense the duty of an advocate is to assist in the administration of the law, and for at least two reasons the function which he performs is a necessary one. In the first place no tribunal is in a posi-

¹ Coleridge, J. in *Dansey v. Richard-on*, 3 E. & B. 144, 159.

² See Holmes, Common Law, Lecture V.

tion to decide a cause until it has been informed of all the facts and arguments on each side. In the second place most laymen are unable thoroughly to understand and properly to present their legal rights. In this view it is difficult to perceive why an advocate is less justified in prosecuting an unjust claim founded on a clear right under the law, than a judge in rendering judgment on the same claim, provided he is guilty of no perversion of fact or misstatement of law. The duty of an advocate as an advocate, like that of a judge as a judge, is to assist in the administration of the law as he finds it, and if he finds it to be in any particular unjust or impolitic, his concern is not with his cause or his client, but with the Legislature. His moral duty to his client and to society is discharged when he has done his best to dissuade the former from pursuing his unjust right. There seems to be no real propriety in his setting himself up above the law which it is his duty to assist in enforcing. He may well say: "Who am I that I should condemn the rights given by the law of the land, and what am I if not an agent to secure for others the rights given them by that law? If those rights are unjust, the responsibility rests not on me, but on those who pursue and those who gave them." We are well aware, however, that this is not only a fundamental, but also a perfectly open question, and we are thankful for Judge Smith's remarks upon it. Those interested may obtain an introduction to the whole subject through discussions in the 3d and 12th volumes of the *Cornhill Magazine*, the 64th volume of the *Edinburgh Review*, and 7 *Irish Law Reports*, 312.

THAT highly respectable English journal, "*The Spectator*," is both surprised and shocked at the manner in which criminal trials are conducted in Illinois; and indeed the verdict in the Cronin murder case must at least be surprising to those who are unfamiliar with the changes in some of our States in the relative functions of judge and jury, and who have always supposed that a separation of the functions of the two branches of the tribunal is a fundamental principle of the English law. "*The Spectator*" remarks: "It is when we come to the trial itself that the Illinois method seems to Englishmen so singular and even so repulsive. There is practically no judge in the court, only a trained assessor, who presides in a way which here would be considered undignified, accepts or excludes evidence, and explains to the jurymen any difficult points of law. All substantial power is left to the jurymen, who not only give the verdict on the facts, but pass the sentence also. These jurymen are not casual citizens chosen by chance, but are selected by a system of challenge so elaborate as to fix upon them the eyes of the whole community. It is nearly impossible that under such circumstances the opinionated should not become obstinate, or that a man known to be opposed to capital punishment should consent to suppress his convictions in deference to the law. The result is that in Illinois deliberate and cruel murder is, even when proved to the full satisfaction of the tribunal appointed to try the charge, not a capital offence." Allowing for the natural heat of a Unionist journal in all matters connected with this particular case, the above criticism seems to be a sound one. Indeed, the Illinois law which imposes on the jury the duty not only of finding the facts, but also of applying the law, and which thus vastly increases the chances of a disagreement, is to our mind another illustration of the evil of confusing law and fact,—an evil to which much of the inefficiency of the jury system may be attributed.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ATTACHMENT—DELIVERY BOND.—Defendant, the owner of attached property, executed to plaintiff, the attaching creditor, a delivery bond, the obligation of which was that the attached property should be properly kept and taken care of, and delivered on demand to the marshal to satisfy any judgment rendered, etc., or that the defendant might sell the same and pay the appraised value thereof. *Held*, that accidental destruction by fire while the property was in the possession of the defendant was no defence to any action on the bond. *Doggett, Bassett & Hills Co., v. Black et al.*, 40 Fed. Rep. 439 (Ind.).

CONFLICT OF LAWS—LIMITATION OF ACTIONS.—An action of tort for negligence was brought in Georgia, under a statute of Alabama, where the injury happened. The statute prescribed no period of limitation. *Held*, where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than the general law of limitation prevailing in that State, the *lex fori* and not the *lex loci* applies on the subject of limitations. *O'Shields v. Georgia Pac. Ry. Co.*, 10 S. E. Rep. 268 (Ga.).

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—Intoxicating liquors transported from another State to a point in Kansas are subject to the laws of Kansas relating to the sale and disposition thereof, to the same extent as are other intoxicating liquors already rightfully existing in the State, and cannot be sold at the place of destination, in the original packages or other form, for use as a beverage. The police powers of the State, so exercised, does not infringe on the power of Congress to regulate interstate commerce. *State v. Fulker*, 22 Pac. Rep. 1020 (Kan.).

CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE.—Natural gas when brought to the surface and placed in pipes for transportation is an article of commerce; and an act of a State legislature, making it unlawful for any person, natural or artificial, to conduct natural gas from the State is legislation on interstate commerce and unconstitutional. "It is not a regulation . . . designed to secure the health, safety, or comfort of the citizens of the State. . . . The object is to keep natural gas within the State." It is therefore not a valid exercise of the police power, but an interference with the right of Congress to regulate interstate commerce. *State ex rel. Corwin v. Ind. & O. Oil, Gas, and Mining Co.*, 22 N. E. Rep. 778 (Ind.).

CONTRACTS—ILLEGALITY—CONTRACT TO INFLUENCE LEGISLATION.—Plaintiff and defendant entered into this contract: the plaintiff promised that it would not apply to the Legislature for a land grant, and that it would assist the defendant in getting a grant; the defendant promised that, in case the effort to secure a grant were successful, it would give the plaintiff a part of the land, as compensation for the plaintiff's assistance; there was a stipulation that the means to be used in securing the grant should be reasonable and proper. *Held*, the contract is void as against public policy. *Chippewa Valley & S. Ry. Co. v. Chicago, St. P., M., & O. Ry. Co. et al.*, 44 N. W. Rep. 17 (Wis.).

CONTRACTS—PARTIAL PERFORMANCE—BREACH—QUANTUM MERUIT.—The plaintiff contracted with defendant county to construct certain cells in the county jail; he was to furnish materials of a certain kind, and to do the work in a certain specified way. He completed the work, but failed to comply with the contract in certain particulars; part of the job was perfectly well done; the defective part could be remedied so as to make the entire job conform to the contract. *Held*, the plaintiff can recover on a *quantum meruit*; so far as the work was well executed, the county, though it has not accepted the work, has received a benefit, which it cannot restore without material injury to the building, as the work done is become a part of the realty. The measure of damages is the contract price less damages to the defendant for breach of contract. *Aina Iron & Steel Works v. Kossuth County*, 44 N. W. Rep. 215 (Ia.).

CONTRACTS — REMEDIES FOR BREACH AFTER PART PERFORMANCE. — Defendant hired the plaintiff for one year at a salary of \$400 payable monthly, and turned her off at the end of two months. Plaintiff sued in *quantum meruit* and recovered two months' salary. She now sues in *assumpsit* for the wrongful dismissal. *Held*, that, having considered the contract as rescinded in the first action, the plaintiff cannot now treat it as continuing. *Keedy v. Long*, 18 Atl. Rep. 704 (Md.).

CONVERSION — RIGHTS OF SUCCESSIVE EQUITABLE ASSIGNEES. — Plaintiff undertook to prosecute a claim by U. against Z., under a contract by which plaintiff was to receive one-third of whatever was obtained, U. retaining the right to compromise the claim if he thought best. Afterwards U. assigned the claim to S., who was ignorant of plaintiff's contract, as collateral security for a debt. The plaintiff was prosecuting the claim by suit; but S., U., and Z., without his knowledge, compromised it. By this settlement S. released U., and U. released Z. from their respective debts, upon the delivery by Z. to S., through U's agent, of certain non-negotiable bonds. This action is against the executor of S. for the value of one-third of these bonds. *Held*, plaintiff is entitled to recover. *Fairbanks v. Sargent*, 22 N. E. Rep. 1039 (N. Y.).

The argument of the court is, that, by the contract, the plaintiff became equitable assignee of one-third of the claim, and by the subsequent assignment S. obtained an equitable right to the remaining two-thirds. That when Z. transferred the bonds to U.'s agent, the plaintiff and U., by force of their contract, became tenants in common at law, and when S. received and retained all the bonds he converted the plaintiff's third. S. is not a second assignee who has first reduced the *chase* in action to possession.

CORPORATIONS — LIABILITY FOR THE NEGLIGENCE OF ITS OFFICERS — FRAUD BY AGENT. — Plaintiff purchased of a broker shares of stock which the treasurer of the company had authorized the broker to sell for him. The treasurer then issued to plaintiff the number of shares called for by the power of attorney, which the latter obtained from the broker, and also transferred the shares to the plaintiff on the company's books. These shares were a fraudulent over-issue, the treasurer filling out blank certificates which the president of the company had signed and left with him. *Held*, the corporation was liable in damages to the plaintiff, as the negligence of its officers, in not examining the books, made the fraud possible. *Allen v. South Boston R. R. Co.*, 22 N. E. Rep. 917 (Mass.).

CORPORATIONS — RIGHT TO HOLD LAND. — Bill in behalf of a corporation to recover lands which had been conveyed to defendants with the intention that they should be for the benefit of the corporation. The defence set up was that plaintiff had no authority under its charter to hold the lands. *Held*, that the defence was available. "While a court might hesitate to declare the title to lands received already and in the possession and ownership of the company void on the principle that it had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company, in violating the law, and enabling the company to do that which the law forbids." *Case v. Kelly et al.*, 10 Sup. Ct. Rep. 216.

CORPORATIONS — TAXATION FOR DEBTS. — Debts due to a corporation, when made the subject of taxation, can be assessed only in the State of incorporation; and debts due from citizens of another State cannot be taxed in that State, although the corporation has complied with a provision in the constitution of that State to the effect that all foreign corporations dealing therein must have a known place of business in such State and an authorized agent upon whom process may be served. *Barber Asphalt Paving Co. v. City of New Orleans*, 6 So. Rep. 794 (La.).

EQUITY JURISDICTION — ENFORCING COVENANTS OF INFANTS. — An infant, in deed of apprenticeship, covenanted not to enter into professional engagements without her master's consent. A motion for a preliminary injunction was made. *Held*, that, as the infant could not be sued upon the covenant, an injunction would not be granted to restrain her from committing a breach of it, or to restrain the other defendants from employing her professionally. *Francesco v. Barnum*, 38 W. R. 187 (Eng.).

EQUITY JURISDICTION — SPECIFIC PERFORMANCE OF CONTRACTS. — Plaintiff (vendee) and defendant (vendor) entered into a contract in writing, whereby

defendant agreed that he would convey a parcel of land to the plaintiff, upon full performance by the plaintiff of his side of the contract. Before the time for performance on the part of the plaintiff it was orally agreed that the defendant should make certain improvements on the land, for which the plaintiff was to pay. Defendant made improvements to the amount of \$500. This sum, by agreement, did not fall due till three years after plaintiff filed his bill. The plaintiff is insolvent; he has performed his side of the written contract in full. *Held*, the case shows no ground for refusing specific performance; the considerations which will justify a court of equity in refusing specific performance of a contract to sell land must have some reference to the contract itself; the possibility that when this \$500 becomes due the defendant may not be able to collect it does not make it inequitable to enforce this contract. *Thompson v. Winter*, 43 N. W. Rep. 796 (Minn.).

FEDERAL COURTS — EXCLUSIVE JURISDICTION OVER PROPERTY IN THE CUSTODY OF THE COURT. — Where property has been levied on to satisfy a judgment in a federal court, it is thereby brought within the custody of the court, and by the death of the debtor before its sale a State court does not acquire probate jurisdiction to administer on it as part of the debtor's estate. *Rio Grande R. R. Co. v. Vinet*, 10 Sup. Ct. Rep. 155.

HUSBAND AND WIFE — EFFECT OF ARTICLES OF SEPARATION. — Articles of separation, by which the husband and wife agree to live apart thereafter, and the husband agrees to pay money annually to a trustee for the support of the wife and children, are valid. The obligation to make such payments continues after the wife has obtained a divorce without alimony. *Clarke v. Fosdick*, 22 N. E. Rep. 1111 (N. Y.).

If the wife obtains a divorce after such agreement, the court will not allow her alimony. *Galusha v. Galusha*, 22 N. E. Rep. 1114 (N. Y.).

Follett, C. J., dissented in both cases.

HUSBAND AND WIFE — ENFORCING CONTRACT BETWEEN IN EQUITY. — A husband was excluded by will from any share in his father's estate, and what would naturally have come to him was given to his wife to support herself and children. The husband and wife separated, but he advanced to her at different times money for the support of herself and children, and she made a written contract to reimburse him out of her share in his father's estate. *Held*, the contract was void at law, yet since it was fair and just equity will enforce it. There is no moral reason for forbidding a wife to contract that she shall contribute out of her separate estate to the support of the family. *Hendricks v. Isaacs*, 22 N. E. Rep. 1029 (N. Y.).

The case was sent back to the surrogate for further proceedings on other grounds.

HUSBAND AND WIFE — RIGHT TO SUE FOR ENTICING AWAY HUSBAND. — At common law a wife has a right of action against a person who entices away her husband. *Bennett v. Bennett*, 23 N. E. Rep. 17 (N. Y.).

INFANCY — GUARDIAN AD LITEM — VACATING JUDGMENT. — A statute provided that where an infant of fourteen or over is defendant, the summons shall be delivered to him personally, and that he shall appear by guardian to be appointed by the court. A summons was delivered to an infant over fourteen; he did not appear, and no guardian *ad litem* was appointed; judgment upon default was rendered against him. *Held*, the judgment was erroneous, but not void; only voidable. It is the duty of the infant, within a reasonable time after he comes of age, having knowledge of the judgment, to take steps to avoid it. *Eisenmenger v. Murphy et al.*, 43 N. W. Rep. 784 (Mich.).

INSURANCE — WAGER POLICY. — One W., the holder of a mutual benefit society certificate, payable at his death to his estate, sold the same to plaintiff, who had no insurable interest in W.'s life. The society assented to the transfer, and issued a new certificate, naming the plaintiff, as beneficiary therein. Plaintiff paid the premiums till W.'s death, and received the amount of the certificate from the society. *Held*, that he could retain the money as against W.'s next of kin, notwithstanding the assignment was void as a wager policy. *Stoelker v. Thornton*, 6 So. Rep. 680 (Ala.).

NEGLIGENCE — CONTRIBUTORY. — A city ordinance prohibited the use of certain neutral ground in a street for vehicles. Plaintiff, the driver of a fire-engine, while on the way to a fire, drove across this neutral ground, and was injured by

guy wires stretched across it by the defendant, at a height sufficient to injure only persons passing in carriages. *Held*, that he was not guilty of contributory negligence. *Wilson v. Gt. Southern Telephone & Telegraph Co.*, 6 So. Rep. 781 (La.).

QUASI-CONTRACT — FAILURE OF CONSIDERATION. — The defendant bought land of the plaintiff and gave in payment a note. Later it was discovered that the land belonged to the defendant at the time the contract was made. In an action on the note the court held that the plaintiff could not recover, as there was no consideration. *O'Neal v. Phillips*, 10 S. E. Rep. 352 (Ga.).

The same question would have arisen if the defendant had paid in cash instead of giving a note and had sued to recover the money. It is interesting to note that the rule *caveat emptor* did not apply.

QUASI-CONTRACT — MISTAKE OF FACT — FORGED CHECK. — The defendant bank discounted a forged check drawn on the complainant, with whom they kept an account. The defendant bank sent this check to the complainant bank, whereupon the complainant credited the defendant with the amount. Some time after the forgery was discovered, and the complainant demanded that the defendant make it good. On refusal a bill is filed to recover the amount as having been paid through mistake. *Held*, that the complainant could recover. *People's Bank v. Franklin Bank*, 12 S. W. Rep. 716 (Tenn.).

This case goes on the same reasoning as that on which *Bank v. Bangs*, 106 Mass. 441, was decided. The defendant bank had not exercised the diligence and prudence on which the defendant might well rely.

A Massachusetts decision in the case of *Bank of Danvers v. Bank of Salem*, as yet unreported, is to the same effect on facts precisely like those of the principal case.

REAL PROPERTY — CONSTRUCTIVE ADVERSE POSSESSION — EVIDENCE OF PRIVACY. — To establish continuity of constructive adverse possession, a written instrument is necessary, but it need not have all the requisites of a valid deed. The lack of a seal will not invalidate it for this purpose. *Kendrick v. Iatham*, 6 So. Rep. 871 (Fla.).

This case follows *Crispen v. Hannaven*, 50 Mo. 536, but seems contrary to *Simpson v. Downing*, 23 Wend. 316, in which case the deed in question was void on its face, not being executed by a party required by a surrogate's order to unite in the execution. The court in the latter said that "a deed or some instrument sufficient in form for the purpose of carrying title" is essential to establish such continuity of constructive adverse possession.

REAL PROPERTY — DEED OF LUNATIC. — The defendant's grantor bought land of a person whom he knew to be a lunatic. The defendant was a *bona fide* purchaser for value without notice. The contract of sale made with the lunatic was perfectly fair and just. *Held*, the title of the defendant was good against the heirs of the lunatic. *Odum v. Riddick*, 10 S. E. Rep. 609 (N. C.).

The deed of a lunatic is not void, but voidable, 2 Blackstone, 295. In some jurisdictions it is placed on the same ground as infancy; and it is held that the deed will be avoided without a return of the consideration even if the conveyance was obtained in good faith, for a sufficient consideration, and in ignorance of the insanity of the grantor, *Gibson v. Loper*, 6 Gray, 279, *Hovey v. Hobson*, 53 Me. 451; but in many jurisdictions the consideration must be returned before the conveyance will be avoided, *Molton v. Camroux*, 2 Ex. 487, *Scanlan v. Cobb*, 85 Ill. 296, and cases cited. In North Carolina the conveyance will not be avoided unless the lunatic has been imposed upon, *Riggan v. Green*, 80 N. C. 286, even if the grantee knew of his insanity. *Odum v. Riddick*, *supra* (semble).

SLANDER OF TITLE PRIVILEGED COMMUNICATION. — A published statement that the publication of certain books, by the plaintiff, is an infringement of the copyright, under which defendants publish the same books, is *prima facie* privileged. To destroy the privilege it is not sufficient to show that the copyright is in fact invalid. Express malice by defendants must be shown. *Lovell Co. v. Houghton*, 22 N. E. Rep. 1066 (N. Y.).

STATUTE OF LIMITATIONS — BONDS. — Action was brought in 1885 on a bond that became due in 1877. To a plea of the Statute of Limitations the plaintiff replied the payment of interest within six years, *i. e.*, in 1880. *Held*, that the bar of the statute was not removed by part payment in case of bonds. "In actions on simple contracts . . . it was held that inasmuch as the promise to pay, express or implied, was the gist of the action, therefore any promise within the statutory period might be assumed to be the promise sued on, . . . and that a new promise was in support of, and not a departure from, the declaration."

"This reasoning is not applicable to actions of debt upon specialties. In such actions the declaration is directly on the obligation contained in the instrument, . . . and can not be sustained upon any subsequent promise of less solemnity." The simple promise to pay the debt, implied from the payment of interest, is merged in the higher obligation. *Toothaker v. City of Boulder*, 22 Pac. Rep. 468 (Col.).

TRUSTS—BEQUESTS TO CHARITABLE USES.—This was an appeal from a decree setting aside a bequest to Henry George, for the publication and distribution of his works. The decision went on the ground that George's writings are subversive of existing laws and that their publication is not a charity. *Held*, that the education of the public is a proper charity, provided it does not tend to corruption of morals or religion and is not opposed to any legal rule, and that agitation for a change in the law is perfectly proper unless illegally conducted. The bequest was sustained. *George v. Bradstock*, 18 Atl. Rep. 881 (N. J.).

The same point was raised in an interesting case, that occurred before the late war, *Jackson v. Phillips*, 9 Allen, 539, where a bequest for the publication of abolitionist literature was contested on grounds similar to those in the present case. The bequest was held valid.

WILLS—CONSTRUCTION—EVIDENCE.—Where, in a will devising all of testator's real and personal estate, the testator devises a tract of land, described as the "west half of the south-west quarter" of a certain section, evidence cannot be introduced that the testator never owned this piece, but did own the "west half of the north-east quarter" of the same section. *Sturgis v. Work*, 22 N. E. Rep. 996 (Ind.).

It seems that with this evidence, taken in connection with the rest of the will, the court might properly have found that there was sufficient to carry the land which the testator really owned, even omitting entirely the words of the particular description. At least, it was proper to receive the evidence, even though it might finally be decided that the will could not be construed to carry this piece of land. Although a testator in incorrectly describing his own property has accurately described something which he does not own, yet that defect may be cured by construction, as well as if the incorrect description did not accurately apply to anything else in the world. And in this case, as in all cases of interpreting a will, all material facts, other than direct evidence of the testator's intention, which are admissible under the general rules of evidence may be looked at. See *Wigram, Interpretation of Wills*, Prop. V.; *Creasy v. Alverson*, 43 Mo. 13; *Patch v. White*, 117 U. S. 210.

REVIEWS.

CRIME ; ITS NATURE, CAUSES, TREATMENT, AND PREVENTION. By Sanford M. Green, late Judge of the Supreme and Circuit Courts of Michigan. Philadelphia: The J. B. Lippincott Co., 1889.

This is not a law-book, but was written, the author says, "in the hope that it might be of some value in aiding to solve some of the great social problems that are now agitating the civilized world." On every page we see evidence that the writer is a philanthropist, and while we may not be inclined to consider that the function of the State is so far that of a philanthropist as Judge Green suggests, it is certain that the book teems with facts and suggestions which must furnish food for considerable valuable reflection. Last year a most valuable book on this subject was published in England, written by Mr. Gordon Rylands, and bearing the same title as this work. These authors agree in the main, their few differences being traceable perhaps to the fact that Mr. Rylands views the question from the strictly economical view, in which philanthropy, as such, bears no part. As every good citizen is something of a sociologist, and as nearly all writers agree that the present system for the management of criminals is inadequate, it can be safely asserted that Judge Green's work is worthy of attention.

P. S. R.

TO ➡

198 Main Stacks

LOAN PERIOD 1 HOME USE	2	3
4	5	6

ALL BOOKS MAY BE RECALLED AFTER 7 DAYS

**Renewals and Recharges may be made 4 days prior to the due date.
Books may be Renewed by calling 642-3405**

DUE AS STAMPED BELOW

[illegible]

